

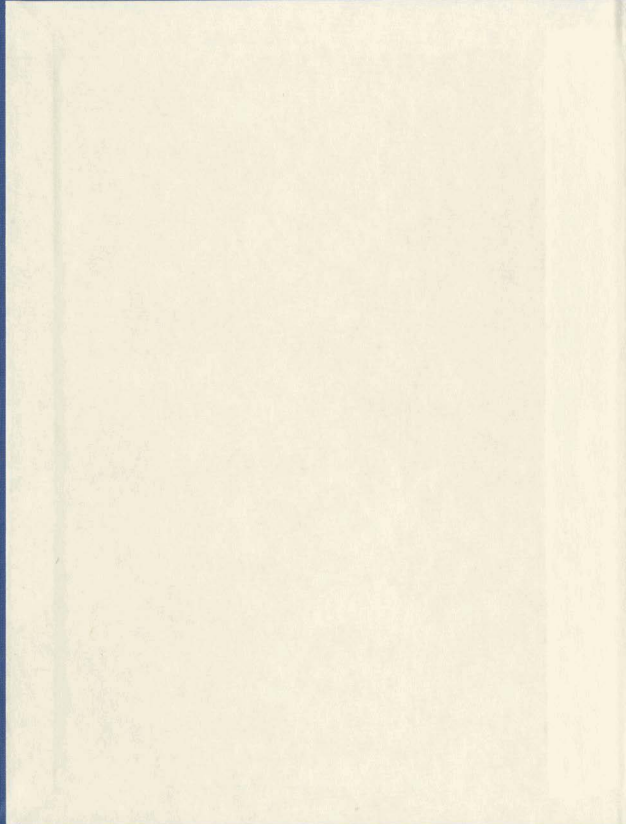
AN EXAMINATION OF RAWLS' NEUTRAL
JUSTIFICATION OF LIBERALISM

CENTRE FOR NEWFOUNDLAND STUDIES

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An Examination of Rawls' Neutral Justification of Liberalism

by

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Abstract:

John Rawls presents a carefully crafted justification of liberalism designed to be acceptable to certain pluralistic societies. The acceptability of his justification depends, in large part, on its being 'neutral' with regard to the reasonable comprehensive doctrines within these societies. The main idea is that within societies whose members do not have a shared conception of the good the *justification of political institutions* cannot be based on assumptions which are contentious to any reasonable group. In this paper, I examine Rawls' attempt to provide a neutral justification by breaking his justification into three stages: 1) the attempt to justify adopting a conception of justice generally; 2) the attempt to justify adopting a normative liberal conception of justice; and 3) the attempt to justify adopting a specific normative liberal conception of justice, i.e., his conception of justice as fairness. This novel way of looking at Rawls' work allows us to best evaluate the strengths and shortcomings of his justification and the project of liberal neutrality more generally. Presenting Rawls in this way also illustrates how writers like Sandel, Habermas, and Rorty misinterpret key aspects of Rawls' project. I conclude by saying that while Rawls is fairly successful in providing a neutral justification for certain liberal societies, maintaining this neutrality hampers 'justice as fairness' from contributing more clearly to current political debates within liberal societies.

Acknowledgments:

This paper arose out of an early version in which I tried to defend what I then called a neutral conception of justice. In this previous draft, I relied primarily on the justification of liberalism which I saw presented in the work of John Rawls. While the themes of liberalism and neutrality and the work of John Rawls remain the central focus of this paper, instead of attempting to defend the neutrality of a liberal conception of justice, I now examine both the advantages and shortcomings of Rawls' justification. This change of focus allowed me to both address many of the criticisms made against the first version and give a more fair evaluation of the project of liberal neutrality. In addressing these criticisms, I have had many helpful discussions with numerous people within the department of philosophy. I would especially like to thank, Dr. Brian Penrose, who introduced me to Rawls' work and supervised some of the previous draft of this essay; and Dr. Peter Trnka, who supervised the completion of the first draft as well as supervising all of this draft. Both have constantly been there with helpful comments, criticisms and encouragement. Without their help, this thesis would not have been completed. I would like to thank the department of philosophy for providing me with a number of teaching assistantships which helped support my period of study. Finally, I would like to thank my parents, Eric and Dorothy Chafe, for their assistance and understanding during the writing period and my brother Mark for his invaluable computer expertise.

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Abbreviations:

- CIS Richard Rorty. *Contingency, Irony and Solidarity* (New York: Cambridge UP, 1989).
- FMM Immanuel Kant. *Foundations of the Metaphysics of Morals* Trans. Lewis White Beck (New York: Macmillan Publishing Com., 1988).
- LLJ Michael Sandel. *Liberalism and the Limits of Justice* (New York: Cambridge UP, 1982).
- LP John Rawls. "The Laws of Peoples" in *On Human Rights: Amnesty Lectures 1993* Ed. Stephen Shute and Susan Hurley (New York: BasicBooks, 1993).
- KPV Immanuel Kant. *The Critique of Practical Reason* Trans. Lewis White Beck (New York: Macmillan Publishing Com., 1989).
- KRV Immanuel Kant. *The Critique of Pure Reason* Trans. Norman Kemp Smith (London: Macmillan Publishing Com., 1987).
- KPW Immanuel Kant. *Kant's Political Writings* Trans. H.B. Nisbet. (Cambridge: Cambridge UP, 1970).
- MEJ Immanuel Kant. *The Metaphysical Elements of Justice* Trans. John Ladd (New York: Bobbs Merrill, 1965).
- PDM Jürgen Habermas. *The Philosophical Discourse of Modernity* Trans. Frederick G. Lawrence (Cambridge, Mass: MIT Press, 1987).
- PL John Rawls. *Political Liberalism* (New York: Columbia UP, 1993).
- PMN Richard Rorty. *Philosophy and the Mirror of Nature* (Princeton: Princeton, UP, 1979).
- RPR Jürgen Habermas. "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism" in *The Journal of Philosophy* Vol. 93: 109-131.
- TJ John Rawls. *A Theory of Justice* (Cambridge, Mass: Harvard UP, 1971).

Introduction: Liberalism and Justification

This paper examines the justification of liberalism offered by John Rawls. At a general level, we can identify liberalism as support for, at the very least, the following three claims:¹ 1) a society's public institutions should not be designed to promote a particular conception of the good if that conception is contentious within that society;² 2) the development of fair procedures for settling disputes regarding basic public institutions should be given precedent over attempts to establish a common conception of the good; and 3) individuals should be granted certain rights under which they can pursue their own conception of a good life. While all liberals seemingly agree with these basic claims, they disagree about what else is entailed by the liberal position. For example, the split between classical and egalitarian liberals centers on what should be the proper balance between rights to equality and rights to individual liberty.³ This balance is crucial in determining the degree to which liberals should support the redistribution of wealth within a society. Egalitarian liberals, e.g., T.H. Green and Ronald Dworkin, hold that liberals should support a fairly large degree of wealth redistribution on the grounds that it helps ensure the equal value of political rights within a society. Classical liberals, e.g., Robert Nozick

¹ I do not know of another writer who identifies liberalism exactly in these terms. These three claims do however sufficiently identify the tradition of writers, extending from Locke to Rawls, who are commonly held to be liberals without becoming embroiled in debates about what else is entailed by the liberal position.

² A conception of the good is contentious within a particular society if appeals to the conception are not granted by the overwhelming majority within debates concerning their public institutions. For example, a Catholic conception of the good would be contentious within the public debate of contemporary Canadian society because a large number of people would hold contrary conceptions of the good and would not accept appeals to a Catholic conception as a means of settling disputes concerning their basic institutions.

³ For an excellent overview of the split between classical and egalitarian liberals see L.T Hobhouse's classic *Liberalism* (Cambridge: Cambridge UP, 1994); pp. 81-102.

and Milton Freedman, on the other hand hold that liberals should oppose a large degree of redistribution on the grounds that it unfairly interferes with the individual's right to private property.

Rawls' project is based on seeing liberalism as a position which requires a particular type of justification. Liberalism is often associated with the view that public institutions should be justifiable to those who live under them.⁴ It has even been claimed that what distinguishes liberal theory from other political theories is this concern with justification.⁵ There is however a great deal of disagreement amongst liberals about what constitutes an acceptable justification of their position. There are even some, e.g., Richard Rorty, who question whether liberals should be still engaged in the practice of justification at all. One of the main causes of dispute stems from liberal support for neutrality amongst conceptions of the good. A conception of the good refers to a person's overall view of how their life should be lived. For example, a person's conception of the good may be based upon the idea that the pursuit of artistic achievements is the type of life most worth living; or that acting in accordance with God's Will is how one should live; or that true

⁴ Granting reason, or rational justification, authority over tradition was seen by *Enlightenment liberals*, like Kant, as necessary to ensure political autonomy and individual liberty. See Immanuel Kant, "What is Enlightenment?" in *On History* Ed. L.W. Beck (New York: Macmillian Publishing Company, 1963); p. 3, Ak. 35. For contemporary liberals who see liberalism as closely associated with justification see Charles Larmore, "Pluralism and Reasonable Disagreement" in *Political Theory* Vol. 18 (1990); and Jeremy Waldron, "Theoretical Foundations of Liberalism" in *The Philosophical Quarterly* Vol. 37 (April 1987).

⁵ Waldron, p. 128. There are reasons however to dispute that the practice of justification sufficiently distinguishes liberalism from other political theories. As Michael Oakeshott points out, the tendency to see one's political theory as rational, and thereby justifiable, is a view which is held not only by liberals but by proponents of all modern political theories. See his *Rationalism in Politics and Other Essays*, (Indianapolis: Liberty Press, 1991); p. 5.

- happiness is found in following a collection of pursuits perhaps focused around family, employment and service to one's community.

All people can be seen to hold some conception of the good, even if they do not explicitly formulate it as such or if it is not wholly consistent.⁶ The conception of the good one adopts affects most, if not all, aspects of the person's life. If one thinks that the pursuit of artistic achievements is the type of life most worth living, this will affect the person's career choices, educational choices, the type of political arrangements the person is likely to favour, the type of people they will likely associate with, etc. In some societies, there is widespread agreement on large portions of a common conception of the good. *Communist Russia or contemporary Iran may be seen as examples of such societies.*⁷ In other societies, e.g., contemporary Western societies, no one conception of the good is shared by the vast majority of citizens.⁸ One of the problems which these pluralistic societies face is that they cannot appeal to a shared conception of the good to determine how their basic social institutions should be arranged. These basic institutions include the

⁶ It could be argued that under certain conditions, e.g., if a person has severe mental disabilities or are comatose, that they may not have the mental capabilities to hold a conception of the good. The same type of claims can also be made regarding the capacities of children and infants. Such cases raise a number of important political questions, including the question of whether some forms of paternalism may be justified within a liberal society. But given that addressing these issues would take us well beyond the scope of this paper, nor are they material to its main thesis, I make the assumption that all people can be seen to hold some type of conception of the good.

⁷ It may be objected that these societies simply oppressed opposition, masking the degree to which there is a diversity amongst conceptions of the good within them. If, however, societies in which there is such wide-spread agreement on a conception of the good are only theoretical possibilities - not having historical illustrations - this does not affect the argument of this paper which is concerned only with problems arising in pluralistic societies.

⁸ The extent to which there is disagreement within certain pluralistic societies is, as we will see below, important to both the problem of justification within pluralistic societies and Rawls' proposed solution.

society's principle political, economic and judicial arrangements. In a society in which there is agreement on a conception of the good, these basic institutions can be arranged so as to best foster that shared conception. For example, in a society focused on achieving religious salvation, the basic institutions could be arranged so as to maximize the citizens' adherence to religious practices. Disputes regarding the basic institutions could be resolved in terms of which arrangement best achieves the society's shared goal. Appealing to a shared conception of the good is not an option for pluralistic societies. The idea of neutrality comes into play here. Neutrality is based on respecting the differences between conceptions of the good when determining a society's shared public institutions. Rather than determining the basic social institutions in terms of only one conception of the good, e.g., the conception held by the most powerful group within a society, support for neutrality entails trying to take account of all the different conceptions of the good within a society when formulating its basic institutional structure.

Liberals are in agreement in their support for neutrality.⁹ In fact, some liberals have argued that it is the neutrality of their position which distinguishes liberalism as the preferable political arrangement for pluralistic societies.¹⁰ Liberals disagree however about what is entailed by a commitment to neutrality. There are at least three distinct

⁹ The word 'neutrality' is a recent addition to the lexicon of political philosophy. It is also not a word that all liberals have adopted, nor want to adopt, to describe their positions (e.g., see PL., p. 191). Yet the idea of neutrality, taken as respect for the fact that people hold different conceptions of the good, can be found in one form or another within the writings of all liberal writers, including, Locke, Kant, Mill, Green, Habermas and Rawls.

¹⁰ See PL, pp. 9-10; and Thomas Nagel "Moral Conflict and Political Legitimacy" in *Philosophy and Public Affairs* Vol. 16; pp. 215-6.

- ways of construing a commitment to neutrality.¹¹ The first is called 'neutrality of effect.' Neutrality of effect focuses on the consequences an institutional arrangement has on the prospects of different conceptions of the good. Neutrality of effect is achieved if a society's public institutions do not unfairly advantage (or disadvantage) any particular conception of the good. In other words, neutrality of effect holds that our public institutions should be equally accommodating to all conceptions. It thus precludes such things as formulations of the political constitution which, even unintentionally, disadvantage particular groups, as would be the case if the constitution enforced presuppositions which discourage a particular conception of the good. A second type of neutrality is called 'neutrality of aim.' This type of neutrality states that public institutions are only prohibited from aiming to further any particular conception of the good. It may be distinguished from neutrality of effect in that neutrality of aim is not concerned with the unintentional effects which the formulation of our public institutions have on the prospects of any conception of the good. As long as the institutions are not established so as to foster any particular conception of the good, neutrality of aim is achieved. The third type of neutrality is called 'neutrality of justification.' Neutrality of justification is the idea that neutrality need only extend to the justification given for a particular set of public institutions. In other words, under neutrality of justification the neutrality of public institutions is established not by examining the institutions themselves but by examining their justification. If a method of justification is acceptable to all groups then the

¹¹ The different meanings of neutrality have been presented by a number of writers. See PL, 191-3; Joseph Raz *The Morality of Freedom* (Oxford: Clarendon Press, 1986); pp. 112-7; Charles Larmore, "Political Liberalism" in *Political Theory* Vol. 18 (August 1990); p. 341; and Will Kymlicka "Liberal Individualism and Liberal Neutrality" in *Ethics* Vol. 99 (July 1989); pp. 883-6.

institutions justified by it are seen to properly respect different conceptions of the good. Presumably, an institutional arrangement would not be justifiable to a particular group if its outcome strongly discouraged that group or if it was arranged to pursue a conflicting conception of the good. The justifiability of a particular institutional arrangement would certainly depend on the prospects each group would have under it. Yet for neutrality of justification, the prospects which groups have under an institutional arrangement are secondary in establishing their neutrality. That public institutions could be justified without making unfair suppositions is key. Neutrality of justification focuses then on the development of fair procedures for determining basic institutions rather than the effect which these institutions have on the different conceptions once adopted.

Most liberals have taken neutrality of justification as what is required to satisfy a commitment to neutrality.¹² Yet neutrality of justification can itself be construed in at least three different ways.¹³ The first type is exemplified by liberals like Kant and Mill.¹⁴ Both attempt to achieve justificatory neutrality by establishing standpoints which are seen as equally accessible to all members of society. Kant bases his justification of liberalism on his conception of the person as having free will.¹⁵ Given that all people are held to have

¹² For an overview of why Rawls, and liberals more generally, tend not to focus on the other two forms of neutrality, see PL, pp. 191-4.

¹³ I do not know of any writer who distinguishes the different types of neutrality of justification in the way that I do in the following paragraphs, but I think such differences can be clearly seen in the writers I address.

¹⁴ Neither Kant nor Mill formulate their position explicitly in terms of neutrality of justification, but they attempt to avoid biasing any particular conception of the good through justificatory means.

¹⁵ A detailed account of Kant's position is given below in the second section of chapter 1.

free will, a justification given in terms of what is required to respect it should be equally applicable to everyone, regardless of what conception of the good people hold. That justice, for Kant, is derived independently of any appeal to a conception of the good allows it be neutral to all the different conceptions. Mill argues that liberal institutions can be justified in terms of the principle of utility. For Mill, what justifies liberalism is that given everyone's differing conceptions of the good, liberal institutions allow for the greatest amount of satisfaction of people's desires.¹⁶ The principle of utility is based on an universal perspective in that it takes everyone's happiness, as they define it for themselves in terms of their own conception of the good, as equal.¹⁷ Utilitarians support the institutional arrangement which allows for the greatest amount of satisfaction, regardless of how this arrangement distributes happiness across the different conceptions of the good found within a society. It is this disregard for how satisfaction ends up being distributed across the different conceptions which allows Mill to be seen as also maintaining a neutrality of justification.

Many contemporary liberals question, however, whether presenting a justification in terms of a universally accessible perspective, in the way which Kant and Mill do, legitimately respects differences between people's conceptions of the good.¹⁸ While Kant and Mill present justifications which attempt to establish a universally accessible

¹⁶ J.S. Mill, "Utilitarianism" in *The Six Great Humanistic Essays of John Stuart Mill* (New York: Washington Square Press, 1963); pp. 305-6.

¹⁷ Mill writes: "That principle [of utility] is a mere form of words without rational significance, unless one person's happiness, supposed equal in degree (with the proper allowances made for kind), is counted for exactly as much as another's" *Ibid.*, p.306.

¹⁸ For example, see Larmore's "Political Liberalism," p. 345.

standpoint, in both cases the acceptance of this standpoint depends on accepting aspects of their wider moral theory. *Kant's justification presupposes the acceptance of his conception of the subject.* The acceptability of Mill's utility principle as a means for justifying liberal institutions is based on seeing the principle as the basis of all moral deliberations. While both do not restrict the conception of the good held by people within their justifications, the acceptance of their method of justification rests on the acceptance of certain substantive positions which may disadvantage certain groups. With regard to Kant, numerous writers have forcefully argued that the presuppositions built into acceptance of the Kantian subject deny certain conceptions of the good a place when justifying political institutions.¹⁹ With regard to the principle of utility, Kantians argue that it is unable to provide a justification for categorical rights, and that it thereby rejects their position from the start.²⁰

The other two types of neutrality of justification are based on widening the scope of the neutrality to ensure that it does respect differences in people's conceptions of the good, even with regard to its presuppositions. The first claims that neutrality of justification extends to all aspects of any conception of the good, except appeals to pure instrumental reason.²¹ The second extends neutrality only to those aspects of conceptions of the good which are in dispute within a particular society. Yet not all contemporary

¹⁹ See LLJ, p. 22.

²⁰ FMM, pp. 5-6; Ak. 389.

²¹ This position is presented by William Galston and mistakenly (I argue) attributed to Rawls. See Galston's "Defending Liberalism," in *American Political Science Review* Vol. 72 (Sept 1982).

liberals are supportive of these types of extended neutrality of justification. Jean Hampton sees the pursuit of extended justificatory neutrality as "quixotic," "deeply misguided" and dangerous to key liberal positions.²² Extending neutrality of justification to the presuppositions of a justification seemingly places almost impossible demands on providing an adequate justification. How are liberals to present a justification which does not in the process violate a commitment to neutrality if, for example, they cannot make claims about the nature of persons, their motivations, or their beliefs? An extended justificatory neutrality seemingly *undercuts the attempt to justify any political position, including support for neutrality itself*.²³ More troubling to liberals like Hampton is that the very substantive ideals of liberalism, e.g., respect for individual's rights and support for toleration, may be put at risk if a commitment to neutrality is pursued too far. In other words, a commitment to an extended justificatory neutrality may give too much room to nonliberal groups so as not to allow the institutions arrived at to be liberal. For example, if liberals have to provide a justification which does not bias groups which support the subordination (or even the annihilation) of other groups within a society, this would most certainly produce an institutional outcome abhorrent to liberals. The question is should liberals accept a neutral institutional arrangement even if it is not liberal in character? Hampton comes firmly down on the side of defending the substantive aspects of liberalism. A neutral conception of justice, she holds, "that allowed differential economic

²² See Jean Hampton's "The moral commitments of liberalism" in *The Idea of Democracy*: Ed. by David Copp, Jean Hampton and John E. Roemer. (New York: Cambridge UP, 1993); p. 310 and 312.

²³ For example, the main arguments for toleration - including those presented by Locke, Mill and value skeptics - would violate a commitment to neutrality so conceived. For an overview of this arguments see Samuel Scheffler's "The Appeal of Political Liberalism" in *Ethics* Vol. 105 (Oct. 1994).

opportunities depending upon race or sex, or that tolerated severe impoverishment or certain forms of religious intolerance, would be an illegitimate charter for that society - and deserve the adjective 'unjust' - no matter how much support it received from the citizenry."²⁴ Furthermore, she denies that an adequate justification of liberalism even needs to be neutral. For Hampton, liberalism can claim to be 'objectively right' without being paradoxical.²⁵ Even liberals who see the consistency of their position as dependent on providing a neutral justification, would likely agree that not any conception of justice is acceptable, even if it could be shown to be neutral. So how accommodating should liberals be towards nonliberal positions in order to maintain a commitment to neutrality? Yet this very question seems to undercut the commitment to neutrality. How sincere can liberals be to a commitment of neutrality if they will only accept liberal outcomes? Is a commitment to neutrality violated from the start if liberals hold to certain substantive positions which they are not willing to abandon? These questions hit at the heart of an apparent conflict within liberalism between its support for some type of neutrality and its support for certain substantive positions. Faced with this conflict, Hampton calls for the abandonment of justificatory neutrality. Liberals who see justificatory neutrality as crucial in providing an adequate and consistent justification of their position face the difficult task of showing how such a justification can both ensure key aspects of liberalism (as demanded by liberals like Hampton) without undercutting the worth of the neutrality they are trying to establish.

²⁴ Hampton, p.295.

²⁵ See Hampton, p. 310; also see her "Liberalism, Retribution and Criminality," in *Essays in Honor of Joel Feinberg*. Ed. J. Coleman and A. Buchanan (Cambridge: Cambridge UP, 1995).

The problems related to support for neutrality are not the only ones liberals have in providing an adequate justification of their position. Another key problem arises regarding the status which should be given to the basic tenets of liberalism, e.g., the status given to individual rights and support for toleration. Liberals hold that there are certain rights granted to the individual which governments cannot legitimately override. Many liberals hold that these rights must be categorical and universal. Following Kant, a number of liberals hold that in order to justify universal categorical rights, liberalism requires a justification which is independent of beliefs or precepts which are contingent and thereby open to possible revision. We thus find some liberals presenting justifications which are based on, for example, a conception of the subject (Kant), the presuppositions of communicative action (Habermas) or the presuppositions of purposeful action (Gewirth). All these justifications aim to establish certain individual rights as categorical and universal. Not all liberals agree however that individual rights need be categorical and universal. Mill argues that individual rights can be sufficiently justified by appealing to the principle of utility, even though it ultimately rests on the contingency of people's conception of the good.²⁶ Historicists, like Richard Rorty and Michael Walzer, dismiss the very possibility of justifying universal beliefs.²⁷ These writers are historicist in that they hold the truth of any knowledge claim is solely the product of a particular society, and that

²⁶ J.S. Mill. "On Liberty" in *The Six Great Humanistic Essays of John Stuart Mill* (New York: Washington Square Press, 1963); p. 136.

²⁷ See Michael Walzer's *Thick and Thin* (Notre Dame: University of Notre Dame Press, 1994); pp. 4-7. Rorty offers a pragmatic argument against Habermas' universalism. If all truth claims are only claims about the ability to justify, the claim to universal rights is simply the claim that we can justify them to all people at all times. Rorty argues that this claim is untenable because it is based on the ability to justify claims without knowing the grounds by which they will be evaluated. For Rorty, we cannot talk beyond our own community, which is what the claim of universal rights attempts to do. See Rorty's unpublished paper, "Universality and Truth" presented at UBC in March 1994.

therefore truth is contingent on the history of that particular society. For historicists, truth *is not something that can be discovered outside of a particular social context*. They thus reject universalist justification, including the type demanded by Kant and Habermas, as being not available. The problem for providing a justification of liberalism is that liberals are divided between writers, like Kant and Habermas, who are not satisfied with appeals simply to the contingent beliefs within a society and writers, like Rorty and Walzer, who deny that we should try to make claims that are beyond those contingently held within our society. By choosing one side or the other in this debate, a justification risks not only violating its neutrality, but also presenting a position which is unacceptable to either group of liberals.

Yet Rorty sees consequences of historicism other than a mere a rejection of categorical and universal rights. He claims that the entire practice of moral and political justification itself should be abandoned. His rejection of justification is based both on an acceptance of historicism as well on arguments about the conditions of social progress. Rorty holds that historicism limits moral and political justification to the mere articulation of beliefs currently held within a society. Yet he holds the inability to provide a justification is a good thing for liberals because 1) a society not concerned with universal truth more closely accords with the proper ideals of a liberal democratic society, e.g., support of toleration and acceptance of diversity; and 2) it clears the way for social criticism to employ the more effective tools of narrative and utopian politics.²⁸ Is a

²⁸ CIS, p. 44.

justification of liberalism still possible if we grant historicism? And perhaps more importantly, do political justifications, as Rorty suggests, in fact hamper the type of social progress which liberals, like Kant and Habermas, see as dependent on them? The very place of justification in defending liberalism must also be considered by any adequate justification of the liberal position.

In this paper, I argue that Rawls' method of justification is able to address many of the issues that divide liberals concerning an adequate justification of their position. Rawls' strategy can be seen to justify liberalism in a number of stages, each stage employing its own method of justification. At the first stage, Rawls argues for the primacy of justice in terms of the need for stability within a pluralistic society. Rawls holds that it is in everyone's interest to give primacy to justice over one's conception of the good in order to allow for the possibility of a stable society. This argument relies on an appeal to prudent behavior within a particular situation, much in line with utilitarian and Hobbesian arguments for the primacy of justice. It is at this first stage that the nature of Rawls' commitment to neutrality is defined to be justificatory in nature, and limited to areas of conflict within a particular society. The second stage addresses the need for justice to be a *moral conception*. At this stage, Rawls rejects a conception of justice should be based on prudential consideration, if it is at all possible. It is important to recognize how this stage relates to the first in order to see how Rawls is being neither inconsistent nor violates his commitment to neutrality. At the first stage, Rawls argues for the acceptance of a conception of justice generally, regardless of whether it is a liberal conception or not, a

normative conception or not. Having established the need for a pluralistic society to adopt a conception of justice, he then moves to consider what type of conception should be adopted. Rawls holds that in terms of achieving a stable society (a goal granted in the *first stage*) *it is better to have a normative conception of justice, i.e., a conception citizens have some attachment to beyond the mere pragmatic consideration of maintaining peace, if such a conception is available.* Rawls allows for a normative conception by appealing to the fact that the citizens of some pluralistic societies, while not sharing the same conception of the good, may share enough common beliefs from which to develop a normative conception of justice. It is also the case that the beliefs inherent in the public culture of some societies allow for the development of a liberal conception of justice which is neutral regarding the diverse conceptions of the good present within that specific society.²⁹ That the beliefs which underlie a liberal conception of justice can be seen as inherent in the public culture of certain societies allows a liberal conception of justice to be adopted for those societies while not violating a commitment to neutrality. Essentially, Rawls avoids violating neutrality by limiting the applicability of his conception of justice to those societies which have key liberal beliefs, e.g., respect for individuals as free and equal beings, inherent in their public culture. At the third stage, Rawls argues for his specific liberal conception of 'justice as fairness.' Rawls argues for justice as fairness as the preferable normative liberal conception based on the ideas of wide reflective equilibrium and an overlapping consensus. For Rawls, the ability for a conception of justice to achieve

²⁹ Rawls in fact extends this claim even further by holding that certain pluralistic societies have enough common beliefs to neutrally develop an egalitarian liberal conception of justice. Given that the aim of this paper is only to examine his strategy for justifying a liberal conception of justice, I will for the most part ignore this extension of Rawls' position, dealing with it only in the conclusion of this paper.

wide reflective equilibrium depends on its ability to “survive the rational consideration of all feasible conceptions [of justice] and all reasonable arguments for them.”³⁰ In other words, *for a conception of justice to be in reflective equilibrium it must be acceptable, all things considered.*³¹ That justice as fairness can best achieve wide reflective equilibrium shows it to be the most appropriate conception of justice for certain societies. Appealing to wide reflective equilibrium also works to tie the three levels of Rawls’ argument together. By requiring that justice as fairness is ultimately judged based on all considerations concerning justice gives a circularity to Rawls’ argument in that the arguments for a general conception of justice at the first stage affect the ability to achieve reflective equilibrium in the third stage. Likewise, the acceptance of a general conception of justice depends on the constraints the specific conception of justice (adopted in the third stage) places on one’s conception of the good. The idea of an overlapping consensus also ensures that the conception finally arrived at is able to maintain stability within the society. Rawls’ justification can thus be seen as arguing first for the primacy of justice generally. He then argues for a normative liberal conception, without affirming which liberal conception of justice should be adopted. Finally, Rawls argues for a specific liberal conception of justice, justice as fairness, based on its ability to achieve wide reflective equilibrium, with wide reflective equilibrium making the three stages interdependent.

³⁰ Rawls, “The Independence of Moral Theory” in *The Proceedings and Addresses of the American Philosophical Association* Vol. 48; p. 8.

³¹ There are, of course, practical limitations to the consideration of all points of view and possible criticisms. While the idea of perfect reflective equilibrium stands as an ideal, the basic idea that a conception of justice should meet the widest possible range of objections seems widely accepted.

Rawls' method of justification is carefully crafted to respond to many of the problems faced in providing an adequate justifications of liberalism. First of all, Rawls' justification shows how support for neutrality need not be based on prescriptive beliefs about respecting different conceptions of the good. Rawls rather shows support for neutrality to be based solely on pragmatic considerations in presenting a political theory for a pluralistic society. Showing liberal support for neutrality to be itself neutral is crucial in addressing the suspicion that liberals only support neutrality because neutrality leads mostly to outcomes which they support.³² Secondly, Rawls presents a justification which avoids violating a commitment to the neutrality of justification. Rawls makes two types of stipulations which allow him to present a neutral justification. He holds that it is only beliefs that are contentious within a society which cannot be assumed in a neutral justification. This relates a concern with neutrality to the problem of stability within a pluralistic society. Rawls then limits the applicability of his justification to liberal societies, i.e., societies in which certain key liberal beliefs are not contentious. By limiting the applicability of his justification to such societies, Rawls is able to maintain a commitment to neutrality without risking the substantive elements of the liberal position. Thirdly, Rawls offers a justification which, following Mill and Rorty, is tied to the circumstances of the particular society to which the conception is addressed, while at the same time, following Kant and Habermas, can guarantee categorical rights. Rawls is able to do this by avoiding the very question of whether liberalism should be presented in universalist or historicist terms. He argues that support for categorical rights can be found in the public culture of certain societies, without asking whether such rights extend to all other

³² See Nagel, p. 216.

societies.³³ Fourthly, Rawls' use of reflective equilibrium allows for a justification of a particular conception of justice which neither violates a commitment to historicism nor is simply an articulation of the beliefs inherent in the public culture. In other words, Rawls' use of reflective equilibrium is able to meet Rorty's concerns about the possibility of political justification given historicism.³⁴ Finally, Rawls presents a justification of liberalism which is clearly tied to its historical roots. Judith Shklar claims that liberalism is, at its deepest level, a response to the problems which are faced by societies whose members are profoundly divided in their views about what constitutes a good life.³⁵ Rawls' justification highlights the fact that the strength and coherence of the liberal position is only truly appreciated when it is viewed as a solution of a certain problem to which pluralistic societies are prone. While many have complained of the abstractness of his work, I argue that a greater understanding and appreciation of Rawls' overall project can be gained by seeing how closely it is formed by the problems it is meant to address and the type of society to which it is addressed.

Presenting Rawls' theory as a multi-level justification of liberalism is a novel way of looking at Rawls' work. For Rawls, the justification developed in *A Theory of Justice*

³³ Rawls is concerned with presenting a neutral justification of a conception of justice for a particular type of society. In doing this, he avoids making any commitment regarding international justice or universal human rights. To see Rawls' position on international justice, see LP. I briefly address Rawls' position on international justice in the conclusion of this paper.

³⁴ This difference between Rorty and Rawls on the status of political justifications which appeal to beliefs inherent in the public culture is presented in the third section of chapter 2.

³⁵ Judith Shklar's "The Liberalism of Fear" in *Liberalism and the Moral Life* Ed. By Nancy Rosenblum (Cambridge, Mass: Harvard UP, 1989); p. 23.

and *Political Liberalism* is one united argument for justice as fairness. In presenting Rawls' position in terms of a multi-level justification, I do not mean to deny the unity of his argument. Furthermore, my articulation of Rawls' position requires breaking apart *some of Rawls' concepts and establishing these parts separately*. For example, the idea of a political conception of justice includes that it is both a moral conception as well as limits the applicability of justice to questions regarding the basic structure.³⁶ As I present Rawls, I split the moral aspect of the political from its limitation to questions concerning the basic structure, dealing with each at different levels of justification. I do not think, however, that my presentation in the end substantially alters either his conception of the political or Rawls' overall position. Although this is not how Rawls presents his argument for justice as fairness, there are a number of advantages in viewing his theory in terms of the distinct levels of justification which are clearly present within his work. First, it shows explicitly how Rawls' two main works relate to each other. In the way that I present Rawls, we can say that *A Theory of Justice* primarily deals with presenting the argument for justice as fairness as a particular liberal normative conception of justice. The main aim of *Political Liberalism* is primarily to present the arguments for the stability and neutrality of justice as fairness both in terms of it being a general conception of justice and in terms of it being a normative liberal conception of justice.³⁷ *Political Liberalism* also aims to align the argument presented in *A Theory of Justice* with the wider argument which it presents. This entails reformulating the account of stability given in the last section of *A Theory of*

³⁶ PL, p. 11.

³⁷ Rawls is quite explicit that this is how he sees the two works related. See PL, pp. xvii-xviii. There are however clearly some overlap between the two works in that both works argue for the acceptance of same conception of justice.

- *Justice* which presents justice as fairness as a moral conception in violation of liberal support for neutrality. We can say then that *A Theory of Justice* works primarily on (what I have called) the third stage of Rawls' justification while *Political Liberalism* is mostly concerned with the first two stages. Without fully appreciating the complementary nature of Rawls' main two works, the reader misses the full scope and power of Rawls' position. Presenting Rawls' theory as a multi-level justification also serves as a defense of his position. Many of Rawls' critics base their criticism on misinterpreting the nature of his project. For example, Michael Sandel argues that Rawls, following Kant, bases his argument for the primacy of justice on a conception of the person.³⁸ Another point of contention amongst friends and critics is Rawls' place within the historicist/objectivist debate. Rawls is either characterized as an objectivist liberal who is mistakenly taken to be a historicist,³⁹ or is a historicist who mistakenly maintains the Enlightenment project that political institutions need justifications.⁴⁰ Presenting Rawls' position in different stages allows us to clearly see how Rawls is able to avoid Sandel's criticism as well as seeing how Rawls is able to avoid breaking with either historicist or objectivist liberals. Finally, in carefully examining the structure of Rawls' justification, we can come to recognize the limits of the entire project of justificatory neutrality. Rawls' justification pushes liberal neutrality to its furthest point. By looking at the shortfalls of his justification, e.g., its difficulty in contributing to a number of contemporary political

³⁸ See section 3 of chapter 1 below.

³⁹ Kenneth Baynes, *The Normative Grounds of Social Criticism* (Albany: State University of New York); pp. 1-3 and p. 49.

⁴⁰ CIS, p. 57.

- debates, we can clearly see not only the limitation of Rawls' own justification but also the ultimate limitation of any neutral liberal conception of justice.

Chapter 1:

In this chapter, I set out the first part of Rawls' justification for his conception of justice as fairness: his argument for the primacy of justice. Beyond its place in his justification generally, Rawls' argument here is important, for it is the focus of one of the most influential criticisms made against his position. In his book *Liberalism and the Limits of Justice*, Michael Sandel argues that Rawls' claim for the primacy of justice, and what is entailed by it, causes him to violate his commitment to neutrality amongst conceptions of the good. Sandel holds that Rawls is a deontological liberal. The deontological position is based on the acceptance of a particular conception of the person, a conception which Sandel calls the unencumbered self. The unencumbered self is based on the idea that we can divide the capacity for choosing ends from the actual ends people choose. For those who adopt this conception, what is seen as essential to the subject is its capacity for choice. In other words, what is most important about us - at least from the point of view of moral and political theory - is independent of the particular pursuits we follow and is tied to our freedom to choose these pursuits for ourselves. It is entailed by this that none of the subject's ends are essential to it, so that the subject is not encumbered or essentially tied to any particular pursuit. No particular end is seen as constitutive of the subject, regardless of how firmly that end is held. For the unencumbered self, all ends can ultimately be revised. This conception of the subject, Sandel rightfully points out, underlies a great deal of the liberal tradition dating back to Kant. Kant's moral and political philosophy is based on the idea that rational subjects are not totally directed by external forces but have themselves the capacity to direct their own actions. It is this freedom which distinguishes humans from other empirical objects and makes people

worthy of respect. Furthermore, Kant holds it is only by appealing to a conception of the subject in which the capacity for choice is independent of the ends we choose that we are able to avoid basing morality and politics on mere contingent or empirical foundations. In his moral philosophy, it is the universality and unconditionality of the categorical imperative, based solely on formal aspect of the moral law, which provides a proper basis for morality. In his political philosophy, it is the a priori dictates of justice, derived from the moral law, which ensures categorical rights, i.e., rights which cannot be overridden even by appeals to the general welfare of the society.

Rawls' position is clearly indebted to the Kantian liberal tradition.¹ For Sandel, Rawls' Kantianism extends to the adoption, with some modifications, of this conception of the unencumbered self. Sandel also sees Rawls, like Kant, giving this conception of the subject a foundational role within his project and underlying its claim for the primacy of justice. The problem which Sandel sees for both Kant and Rawls is that presupposing such a conception of the person both violates liberal commitments to neutrality and bases their moral theories on a flawed conception of the person, one which cannot account for the full range of our moral and political experiences. For Sandel, the unencumbered self is unable to make sense of a great deal of our moral life, e.g., strongly held religious commitments. In this chapter and the next, I argue that Sandel misinterprets the extent to which Rawls is a Kantian. Because he sees Rawls as accepting Kant's strong rejection of utilitarianism, Sandel fails to recognize the important role utilitarian considerations play in establishing Rawls' position, including its claim for the primacy of justice. Rawls' claim

for the primacy of justice is based not on a particular conception of the person, but rather on arguments concerning the furtherance of peoples' differing conceptions of the good within a common society with shared public institutions. The situation within pluralistic societies also determines, for Rawls, the extent of liberal commitments to neutrality. By examining the underlying rationale of Rawls' claim for the primacy of justice, we shall see that the limits and rationale of liberal commitments to neutrality do not depend upon the acceptance of a particular conception of the person, but are determined by the types of conflicts present within pluralistic societies.

Section 1: Rawls and The Circumstances of Justice

In order to appreciate Rawls' argument for the primacy of justice, we need to examine the type of society for which he sees developing a conception of justice as a viable project and the role a conception of justice is supposed to play for such a society. The need to develop a conception of justice arises only when there is conflict amongst the members of a society. If a society was not marked by conflicts, or if it had a recognized method for quickly settling such conflicts when they did arise, it would have no need to develop a conception of justice. For example, Rawls points out that "amongst an association of saints, if such a community could really exist, the disputes about justice could hardly occur; for they would all work selflessly together for one end, the glory of God as defined by their common religion, and reference to this end would settle every

¹ For example, see TJ, p. viii.

question of right."² Although conflict is essential for there to be the need to develop a conception of justice, not all conflict is a concern for justice. In fact, Rawls is quite specific about the type of conflict with which justice is concerned. First, Rawls limits relevant conflicts to those concerning a society's basic structure. A society's basic structure is "the way in which the major social institutions [which include the principle economic and social arrangements and the political constitution] distribute fundamental rights and duties and determine the division of advantages from social cooperation."³ For Rawls then, conflicts which are a concern for justice focus on the following types of questions: Should the same liberties be extended to all members of society? Should wealth be redistributed within society? Should the basic structure of a society be constructed to best ensure religious salvation?⁴ Not only does Rawls specify that justice is concerned only with conflicts regarding the basic structure, he is also quite clear about the source of conflicts regarding the basic structure with which he is concerned. For Rawls, conflicts about the basic structure primarily arise from demands made on it formulated in

² John Rawls, "Justice as Fairness" in *Philosophy, Politics and Society (Second Series)*. Ed. P Laslett and W.G. Runciman, W.G., (1962); p. 142. To the extent that one would want to claim that such a society did in fact have a conception of justice, i.e., their shared conception of the good as determined by the glory of God, their conception would be clearly quite different from a conception of justice designed to resolve disputes between people who do not share a conception of the good.

³ TJ, p. 7.

⁴ Another way of illustrating what Rawls takes to be the domain of conflict concerning the basic structure is to look at his formulation of justice as fairness, which is supposed to govern this structure. Rawls' formulation of justice as fairness answers the following questions: 1) What scheme of rights should a society adopt? 2) What rights should be guaranteed fair value? 3) On what basis are social and economic inequalities acceptable within a society?

terms of people's diverse moral, religious and philosophical doctrines.⁵ These doctrines are what I referred to in the introduction as conceptions of the good. To act in accordance with the dictates of such doctrines, or one's conception of the good, sometimes requires making certain demands of public institutions. Perhaps the most common example would be a religion which required its members to maintain a certain type of society; yet a moral doctrine which required that everyone be treated equally or a philosophical doctrine which maintained that the basic structure should be determined to maximize economic growth illustrate moral and philosophical doctrines which make similar demands on their adherents. For Rawls, the need to develop a conception of justice only arises for pluralistic societies and is concerned only with conflicts concerning their basic institutional structures.

The primary role of justice, as Rawls conceives it, is to address the problem of stability within pluralistic societies. The development of a conception of justice addresses the key question for Western politics following the Reformation: How is stability within a pluralistic society possible? With the Reformation, European societies became divided by people holding distinct religious views. This brought to the forefront the question of toleration: What attitude should people have towards others who hold contrary (religious) views? Surprisingly, intolerance - and quite often brutal intolerance - was the attitude initially adopted by many Catholics and Protestants. Part of the reason for this is, as Susan Mendus points out, "in a society which was devoutly and fervently religious,

⁵ PL., p. 4. It may seem that self-interest could also be a prime source of conflict. Yet at the level of generality at which a conception of justice is developed, such self-interest would itself have to be formulated in terms of a philosophical position, perhaps a form of hedonistic egoism.

religious toleration was often seen as the greatest heresy of all: in matters of religion, men's immortal souls were at stake, and toleration in this world was not to be granted if the price was damnation in the next. Moreover, and independently of considerations of salvation, the heretic was believed to be committing an offense against God, and for that reason alone was not to be tolerated."⁶ Regardless of this initial bias towards intolerance, many began to see the cruelty of intolerance as being unchristian. Some, like Sebastian Castellion, began to espouse toleration as a Christian virtue. After many years of strife, both sides of the Reformation had widely embraced the principle of toleration. Yet beyond the question of toleration, though closely tied to it, the Reformation also broached the question of how peace and stability are to be maintained within pluralistic societies. Both Protestantism and Catholicism were authoritarian, salvationist, expansionist and doctrinal religions.⁷ This fact brought the two religions into almost immediate conflict, which ultimately resulted in numerous wars. For many at the time, stability could only be achieved if one side or the other was defeated. Stable pluralistic societies, for many, were inconceivable on either practical or normative grounds. As Rawls points out, "liberal constitutionalism came as a discovery of a new social possibility: the possibility of a reasonable harmonious and stable pluralist society."⁸ This initial problem of stability

⁶ Susan Mendus, *Toleration and the Limits of Liberalism* (Atlantic Highlands, NJ: Humanities Press International, Inc., 1988); p.7.

⁷ PL, p. xxv. Authoritative means that these religions employed institutional structures which are supposed to hold sway over their members; salvationist means that both religions aimed towards a salvation in the next life; expansionist refers to the fact that both religions attempted to convert people to their religion and saw no limit to whom they could try to recruit; and finally, both religions were doctrinal in that it was belief in the religion and not just adherence to its practices which was seen as important to ensure salvation.

⁸ PL, p. xxv.

within pluralistic societies, which is at the historical root of liberalism, remains central to Rawls' project. As Rawls states: "Political liberalism starts by taking to heart the absolute depth of that [i.e., the Reformation's] irreconcilable latent conflict."⁹ For Rawls, one of the main reasons for establishing a conception of justice is to help settle and mediate conflicts regarding the basic structure of a pluralistic society. Persistent and unrelenting conflicts with regard to the basic structure, as illustrated by the years of strife following the Reformation, are a source of great social and civil instability. A conception of justice is meant to help ensure stability by addressing these types of conflicts, which it does in two ways. First, a conception of justice settles certain fundamental issues concerning a society's basic institutions. For example, Rawls' conception of justice as fairness holds that all positions in society should be open to all members. In a society which adopted this conception, the members would agree that questions concerning whether positions should be open to all would be settled and not open to further debate. The claim that certain positions should not be open to all would be unjust. Taking potentially divisive questions as already settled serves to limit the number of legitimate conflicts concerning the basic structure. Secondly, a conception of justice serves as a common reference point from which claims made in debates concerning the establishment of a constitution and the other major institutions of a society may be adjudicated. In other words, a conception of justice provides a framework, agreeable to all, from which all sides can work towards the resolution of social conflicts regarding the basic structure.¹⁰

⁹ PL, p. xxviii.

¹⁰ As Rawls states, justice as fairness "is at best but a guiding framework of deliberation and reflection which helps us reach political agreement on at least the constitutional essentials and the basic questions of

In order for a conception of justice to effectively address conflicts stemming from members' diverse points of view, it must be given primacy over the competing demands made from these diverse points of view, at least with regard to questions concerning the basic structure.¹¹ For justice to play the role which Rawls sees that it does, people will sometimes have to act contrary to how they would if their actions were determined solely by their conception of the good unfettered by the demands of justice. At this point, it is worth noting that we have not as yet made any determination about the character of the conception of justice which may be adopted by a pluralistic society. We are only concerned with the argument for the primacy of a conception of justice generally. At this general level, Rawls holds that it is the good of stability which ensures the primacy of justice. If however Rawls' claim for the primacy of justice is based on its ability to help maintain stability, how is it that he can be assured that such a primacy will be granted? It is not initially obvious that people would be willing to grant primacy to justice. For example, a person who holds the view that salvation is granted only to those who strive to develop a particular type of society would surely want to deny that justice should have primacy over their conception of the good. Such religious devotion may also override a person's desire for stability and peace within a society, given the fact that salvation in the afterlife is of prime importance, as is the case, for example, with participants in a Muslim

justice. If it seems to have cleared our view and made our considered convictions more coherent; if it has narrowed the gap between the conscientious convictions of those who accept the basic ideas of a constitutional regime, then it has served its practical purpose" (PL, p. 156).

¹¹ It is, of course, possible that one of these diverse points of view may agree with the conception of justice which is adopted. In this case, justice would not need to override this particular point of view.

jihad. A similar case would be someone, e.g., an anarchist like Alexander Berkman,¹² who held an absolute philosophical doctrine and refused in anyway to compromise their attempts to establish what they saw as the only just institutional arrangement. Can we really expect such persons to accept the primacy of a conception of justice which may be contrary to their views? What is clear from the start is that granting primacy to justice will require a sacrifice, and in some cases a great sacrifice, on the part of some people within society.¹³ The sacrifice they have to make is that they are required to revise their moral, religious or philosophical views *so that the demands they make arising out of these views* are not at odds with the dictates of justice. Essentially this sacrifice entails accepting at the very least some sort of private/public distinction and letting justice have primacy within the public realm. This does not necessarily require the person to abandon the truth of their moral, religious and philosophical claims. It is possible for justice to fulfill its role even if people simply yield to the dictates of justice in the public realm, while maintaining the truth of a contrary position. Without the members of a society yielding to justice at least in public matters, a conception of justice is unable to fulfill its role of maintaining stability.¹⁴

¹² Berkman, a prominent US anarchist, attempted in 1892 to kill a leading steel industrialist because of what he saw as the industry's unjust treatment of its workers. Berkman later refused a pardon which required him to repudiate his actions.

¹³ The extent of this sacrifice will depend on the actual character of the conception of justice.

¹⁴ In saying that groups within society grant this primacy of justice does in no way imply that this process has to be democratic. Yielding to the dictates of a conception of justice by even refusing to rebel against its institutions, even if this is done for the sole reason of the futility of rebellion, is taken to fall under the word grant in the wide sense when dealing with the role of justice. Of course, the reasons for which people accept a particular conception of justice relate to the likelihood of its acceptance and issues concerning its long-term stability.

Although a conception of justice requires primacy at least in regard to questions concerning the basic structure, many people when initially faced with the choice of either risking instability or revising their moral, religious or philosophical doctrines would choose to risk instability. The choice to reject the primacy of justice is not, however, so appealing. First of all, there is the value of stability. This value is clearly illustrated by its absence. The reaction to the cruelty shown by both sides following the Protestant Reformation is at the root of the liberal position. For a recent example of the horrors caused by this type of political instability, we can look to the break up of Yugoslavia and the ensuing civil wars within the region.¹⁵ The value of stability is not however limited to the avoidance of civil conflict. A stable society also allows for greater social cooperation and the benefits which come from such cooperation. The value of social cooperation is that it "makes possible a better life for all than any would have if each were to live solely by his own efforts."¹⁶ For example, general adherence to rules within a stable society allows for enforceable contracts, where each party is bound to fulfill certain responsibilities to which they had previously agreed. This allows people to utilize the better skills of a person in one area and their utilizing the other person's better skill in

¹⁵ For a graphic account of some of the horrors of this war and their philosophical implications, see Catharine A. MacKinnon, "Crimes of War, Crimes of Peace" in *On Human Rights: Amnesty Lectures 1993* Ed., S. Hurley and S. Shute, (New York: BasicBooks, 1993).

¹⁶ TJ, p. 7. While the greater benefits created for all through social cooperation help unify the interests of people within a particular society, these greater benefits are also the source of conflict "since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed" (TJ, p. 4). This lack of indifference with regard to the distributive scheme is in part dependent on the fact that "the benefits they [social cooperation] yield fall short of the demands men put forward" (TJ, p.127). The benefits of social cooperation thus serve both to emphasize the benefits of stability and to underline further the need for there to be a conception of justice to deal with conflicts with regard to distribution of these benefits.

- another area, allowing for a net benefit to both.¹⁷ The value of these benefits of social cooperation are even more important given the fact that societies exist in a condition of moderate scarcity of resources. The amount of resources which a society has under its control is always limited, so that the unregulated use of these resources may lead to a situation in which essential resources are depleted or the essential needs of one or more groups within society are not met.¹⁸ The argument for the importance of stability is based partly then on the advantage of avoiding instability and the benefits - physical, economic and social - to be derived from social cooperation in light of the condition of scarcity of resources. For many, the toleration of those with opposing views is seen as a disaster; but as the earliest proponents of religious toleration came to realize, it is "a disaster that has to be accepted in view of the alternative of unending ...civil war."¹⁹

The reference here to what can be seen as an unending civil war is important.

Rawls' argument in support of granting the primacy of justice is not only based on the benefits it brings, but on the fact that the alternative to its rejection is unending conflict. This point addresses the possible charge that people may be willing to fight for a limited period in order to establish their position within a particular society over the long term. If the alternative is unending strife, so that the possibility of easily establishing one's position

¹⁷ The relation of social cooperation to the economic well-being of a society can be seen in part by the fact that the work forces becomes more specialized (and thus more dependent on others) as societies advance economically.

¹⁸ Poverty groups and environmentalists may object that resources are still not adequately distributed to meet every person's needs or to ensure the preservation of our limited resources, yet the situation would surely be worse in the state of civil unrest.

¹⁹ PL, p. xxiv.

through force is not a viable option, groups would be even more likely to yield to the primacy of justice. The extended period of civil strife following the Protestant Reformation offers a good historical argument for the persistence of pluralism. Rawls does not, however, rely solely on historical arguments. He also provides a philosophical argument for the persistence of pluralism. Rawls sees the plurality of moral, religious and philosophical doctrines as being the result of two factors: 1) the unconstrained use of human reason, and 2) the diversity of people's experiences within society.²⁰ Due to the first factor, we should expect increased diversity in societies which allow for liberties such as freedom of speech and freedom of conscience. Due to the second factor, we should expect increased diversity in societies which are marked by class and cultural differences. As long as these societal factors remain, we should expect such diversity to persist (if not increase). How these two factors relate to the persistence of pluralism is that our choice of religious, moral and philosophical doctrines is affected by a number of considerations, e.g., our experiences, the type of evidence which we accept for or against particular positions, the weight we give to this evidence, etc. These types of considerations, which lead equally reasonable people to hold different moral, religious or philosophical views, Rawls calls 'the burdens of judgment'.²¹ Greater freedom of thought and diversity of experience increases the plurality resulting from these burdens of judgments. That there are these burdens of judgments neither denies the possibility of moral objectivism nor the

²⁰ Rawls sets out six reasons (or burdens on judgment) which account for a plurality of opinions amongst sincere reasonable people, yet underlying these reasons are people's unconstrained use of reason and the diversity of people's experiences. See PL, p. 56-7.

²¹ PL, PP. 54-6.

idea that a consensus may be ultimately achieved, but they do explain why a consensus or convergence should not be expected especially in a society which is already pluralistic.²² We should expect then that pluralistic societies will likely remain pluralistic unless they go through significant structural change or employ a great deal of coercive force. Based on this argument for the likely persistence of diverse positions, the choice becomes one of accepting the primacy of justice, at least with regard to questions concerning the basic structure, or unending civil conflict over the underlying structure of the society.

Finally, Rawls argues for the primacy of justice by specifying and diminishing the demands which the acceptance of a conception of justice make on a person's conception of the good. As pointed out above, Rawls makes a distinction between questions which are a concern for justice and questions having a wider scope, i.e., questions regulated by one's conception of the good. He calls a doctrine 'political' if it is limited to questions concerning the basic structure. He calls people's conceptions of the good, which address a wider domain of issues, 'comprehensive' doctrines. For example, a conception of the good may set out certain personal ideals to follow, as well as make demands about what type of lifestyle to live, which need not directly concern a society's basic structure and are certainly not limited to it.²³ Not only is the application of a political conception of justice limited, so too are the claims employed to justify a political conception of justice. If we claim in justifying a political conception of justice that the society is to be conceived in a

²² Rawls does allow for the fact that the adoption of a conception of justice lessens political differences over time.

²³ See PL, p. 13.

particular way, e.g., as a fair system of cooperation, this claim needs only to be granted within the political realm. For Rawls, the positions one accepts in adopting a political conception hold only in the domain of the political. This includes even the method of deliberation which we employ in developing a conception of justice. The use of 'public' reason claims application only with regard to the domain of the political.²⁴ The conception of the political realm also entails that a political conception of justice needs to be freestanding. To allow for consensus about justice within a pluralistic society, Rawls holds "the conception of justice should be, as far as possible, independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm. In formulating such a conception, political liberalism applies the principle of toleration to philosophy itself."²⁵ Essentially, the idea of a freestanding conception of justice is what I have been calling up to now a commitment to justificatory neutrality. Rawls has come to appreciate desert landscapes but, not like Quine, for their aesthetic appeal, rather for the pragmatic reason that *making minimal presuppositions is the easiest and most secure way to ensure the primacy of justice within a pluralistic society*. This appeal to the domain of the political diminishes the demands on accepting the primacy of justice by not demanding people to abandon their beliefs, but rather asking them only to yield to the acceptance of certain beliefs within the political realm. One may grant a belief in the development of a conception of justice, while holding a contrary view within one's comprehensive doctrine.

²⁴ Rawls writes: "we must distinguish between a public basis of justification generally acceptable to citizens on fundamental political questions and the many nonpublic bases of justification belonging to the many comprehensive doctrines and acceptable only to those who affirm them" (PL, p. xxi) Rawls develops his idea of a public reason in *Lecture VI of Political Liberalism*, pp. 212-55.

²⁵ PL, pp. 9-10.

During the Reformation, people's beliefs were a political concern, e.g., governments wanted people to abandon their religion outright. A political conception of justice on the other hand is concerned only with what is granted within the realm of the political, regardless of people's wider beliefs. A person can have a split recognition of a particular claim: denied by one's comprehensive doctrine, but granted when developing a conception of justice. This type of split recognition may be granted due to the constraints on the development of a conception of justice based on an agreement amongst people within a pluralistic society and the lack (or lessening) of these constraints when employing one's conception of the good. Again, Rawls is attempting to lessen the damage to people's conceptions of the good in granting primacy to justice. The relationships between the political conception of justice which a society adopts and the comprehensive doctrines which people hold can be numerous. A political conception of justice may be conceived as being derivable from a person's comprehensive doctrine, or this fit may be based on the abhorrent fact that no better option exists than the acceptance of a conception of justice. To grant primacy to a political justice, however, the domain of the political must have some fit with a person's comprehensive view of life.

Although Rawls' argument for the primacy of justice is quite appealing, it is clear that some will still choose to risk instability rather than revise their moral, religious and philosophical doctrines. The question then is: how does the fact that some may not grant primacy to justice affect the viability of developing a conception of justice? The answer to this is essentially one of numbers. If sufficient numbers of people fail to grant justice primacy in the public realm, a conception of justice would not be able to fulfill its role. It

is clearly possible that the number of people who choose not to revise their doctrines will be great enough in some cases so as to make attempts to develop a conception of justice pointless. It is this situation which existed, for example, directly following the Protestant Reformation and currently exists in parts of the former Yugoslavia. For Rawls' project, however, granting primacy to justice is *sine qua non*. Developing fair procedures for settling conflicts concerning the basic structure cannot proceed if the primacy of justice is not granted. Essentially, any society for which Rawls' project is viable would have to grant primacy to justice. Rawls thus stipulates that the citizens of societies to which his project is directed have an "intuitive conviction of the primacy of justice."²⁶ Rawls' stipulation that societies grant primacy to justice certainly limits the application of his project, for it is not the case that societies universally grant primacy to justice. A key test for Rawls' project is then whether any real society can be so characterized. If no society is actual willing to grant primacy to a conception of justice, the development of a conception of justice would not be a viable project. Rawls' argument for justice as fairness depends a great deal on the characterization of the society which he directs his argument being true of some society. Although he does not argue the point, Rawls clearly holds that contemporary Western societies, at the very least, are willing to grant primacy to some conception of justice. Given the current public culture of such societies, and the important role appeals to justice have and continue to play in shaping their basic

²⁶ TJ, p. 4. Similarly, Rawls holds that the idea of "society as a fair system of cooperation...[is] implicit in the public culture of a democratic society" (PL, p. 15).

*institutional structure, it seems a strong case could be made that such societies do widely grant primacy to justice.*²⁷

Rawls' argument for the primacy of justice is based on the claim that people are willing to grant primacy due to their preference for stability over the damage the constraints of justice have on their conception of the good. A conception of justice, the acceptability of which ultimately relies on peoples' preferences, would seemingly have to make appeals to a conception of the good. If what underlies the claim for the primacy of justice is people's preferences, it would seem that the grounds for that choice needs to be determined. Yet wouldn't appeals to a conception of the good violate Rawls' commitment to neutrality? It is key to remember here that, for Rawls, the role of a conception of justice is to help settle certain conflicts which exist within a society. Key to its role as a dispute mechanism, the development of a conception of justice must be shown to be fair, even in its presuppositions. *A conception of justice which makes unfair assumptions cannot serve as a viable basis for settling disputes concerning the basic structure.* Therefore, the justification of a conception of justice must be shown to be neutral, i.e., not making unfair suppositions even in its suppositions. Yet this neutrality,

²⁷ We must keep in mind that at this point in the argument, we still do not know the character of the conception to which people are asked to give primacy. Ultimately the acceptability of a conception, i.e., whether people will grant it primacy, will depend on its character. Thus claiming at this point that there will be enough people in some societies who would accept the primacy of justice is tentative, dependent on the development of a full conception of justice. Rawls' characterization of the type of society which would accept justice as fairness is also incomplete. As we will see, the key test for the applicability of Rawls' theory is that all his assumptions about the type of society in his justification are true of at least some Western societies. Such a judgment can only be made after his complete justification is presented. Furthermore, to claim that contemporary Western democracies do grant primacy of justice is not to claim that the institutional structure of these societies perfectly accords with what is seen to be just (even as it is defined within these societies). A primacy of justice only holds that people give a conception of justice weight over their conceptions of the good in regard to the basic structure.

which is needed to ensure fairness, need only extend to what is in dispute within that particular society to ensure fairness. If a claim is not disputed within the public debate of a society, it can be assumed in the justification of a conception of justice for that society without being unfair. For example, if there are no people who reject Christianity, appeals to Christian beliefs in the public debate within that society would not violate claims to neutrality. In such a society, making appeals to Christian beliefs would not be objected to as being unfair. In other words, granting non-contentious claims does not threaten the fairness of a conception of justice. We can say then that, for Rawls, the neutrality of a conception of justice is locally defined in terms of the conflicts which exist within a particular society. For Rawls, it is not that appeals to certain elements found in a person's conception of the good are not allowed; rather what is not allowed are appeals and assumptions of elements found in people's conceptions of the good which are contentious within that society. By claiming that citizens have an intuitive conviction of the primacy of justice, Rawls also allows that the good of stability, i.e., the rationale for granting primacy to justice, to be non-contentious within the societies for justice as fairness is a viable conception of justice. In other words, Rawls grants the good of stability because he holds the good of stability to be granted by everyone within the type of societies he addresses.

Section 2: Kantian Liberalism

Much of Sandel's criticism of Rawls is based upon his claim that Rawls is firmly committed to certain key aspects of Kantian liberalism. Before setting out Sandel's argument, we need to be clear about some of the basic elements of Kant's moral and political philosophy. Questions concerning what aspects of Kant's position Rawls accepts and whether they share the same rationale for accepting similar positions can only be determined once we are familiar with Kant's positions and the rationales for them. Kant begins his moral philosophy with an analysis of moral obligation, or duty, as the motivation for all moral actions.²⁸ Every action has both a cause and an effect. When the action is directed by a rational agent, its cause is the agent's motive. The result of the action is its effect. Actions taken by a rational agent also involve the idea of an end. The end of an action is what the agent expects to be its effect. When someone twists the top of a pill bottle, the end of their action, i.e., its expected result, is to open the bottle. As events often do not meet expectations, the end and the effect of an action need not be the same. It may be the case that you cannot open the pill bottle by simply turning the cap. *The motive of an action and its end are however often the same. In fact, Mill holds that all actions are motivated by their ends.*²⁹ Kant disagrees. He holds that when we are motivated by duty, our motivation is not affected by any consideration of ends. When we truly act out of duty, we are motivated only by duty itself. This view of duty has a number of important consequences for Kant's moral theory. First, the moral worth of an action is

²⁸ Kant's account of duty is given in the first section of the FMM; pp. 11-25; Ak 392-405.

²⁹ Mill, "Utilitarianism," p. 244.

independent of its consequences. If you have a moral obligation to lend assistance to someone in distress, and you act with all your power to offer assistance, your actions are morally commendable regardless of whether the circumstances enable you actually to help the person or not. Given that duty is not directed by the attainment of some end, the attainment of an end does not affect the moral worth of an action. Secondly, what is morally important about an action is not its end nor its effect, but its motive. If you offer someone assistance, but do so in the hope of some reward, then your action is not morally commendable even though performing the exact same physical action would be morally commendable if done from a sense of duty. Whether one acts out of a sense of duty - and thereby is not directed by the attainment of any end - alone is morally significant. Thirdly, that the prospects of bringing about some end are morally irrelevant forces Kant to reject many traditional approaches to political and moral justification, including those relying on teleological reasoning or calculations of prudent behavior. Even a justification based on the attainment of a possibly universally accepted end, e.g., the furtherance of collective human happiness or of self-preservation, is unable to serve as a basis for morality as Kant conceives it.³⁰

Kant proposes that morality is based on our faculty of practical reason, so that the moral law is itself a law of reason.³¹ Practical reason is “the capacity of acting according

³⁰ As we will see below, Kant does allow for there to be an object which the moral law aims at, i.e., the highest good. Yet the highest good is not merely universally accepted, but objective. The highest good should not be confused with an empirically determined end or conception of the good. While there is the possibility of conflict regarding conceptions of the good, Kant's conception of the highest good does not allow for disagreement.

³¹ *FMM*, pp. 19-20; Ak 400. The reason for why there is only one moral law, as opposed to moral laws, is

to the conception of laws."³² We can contrast practical reason with actions done out of impulse. When we act out of impulse, we act in accordance with empirical laws, e.g., psychological or biological laws. We do so however without being mindful of the fact that our behavior is so governed, in the same way that animals are seen to act out of impulse without being mindful of their so doing. Practical reason allows us to form a conception of these empirical laws as laws and thereby allows us to be mindful of the fact that our actions are influenced by them. Rather than being blindly directed by our impulses, practical reason allows us to recognize our impulses as exemplifying laws. It is the ability to form conceptions of these laws as well as our ability to direct our actions solely by the conception of a law, which affords us the possibility to act contrary to our impulses. Without practical reason, i.e., the capacity to form and be motivated to act according to a conception of law, all our actions would simply be governed by biological or psychological impulses. The moral law can be distinguished from other empirical laws in that, as a law of reason, the moral law holds with absolute necessity.³³ Empirical laws of nature could have been different, e.g., our sexual impulses could have been designed to be aroused in different ways; the moral law cannot be other than it is for rational beings.

clear in light of the formulation of the moral law given below.

³² FMM, pp. 33-34, Ak. 412. The faculty of reason is responsible for systematizing laws into a unified system. In Kant's *Critique of Pure Reason*, the faculty of reason is viewed negatively as attempting illegitimately to establish the reality of a unified system of the laws. That the faculty of reason views laws as laws, i.e., that it can form a conception of a law, allows it to have a positive employment in Kant's moral philosophy.

³³ FMM, pp. 5-6; Ak. 389. Kant distinguishes knowledge claims in terms of how we come to know them, either through experience (a posteriori) or independently of experience (a priori). By being known independent of experience, a priori knowledge is both necessary and has strict universality (KRV, p. 44; Ak. B4.) All knowledge known by reason is a priori; as such it is not just knowledge which all people happen to agree on, but rather knowledge the truth of which has to be granted as necessary.

Being a pure law of reason, it also does not allow of any empirical elements.³⁴ In order to avoid any empirical elements, Kant holds that the moral law must be a law which practical reason gives to itself. Rather than being empirical, the moral law is a law which is based solely in practical reason. Saying that the moral law is a law which practical reason gives to itself does not mean however that each person gives themselves their own moral law in terms of their own individual conception of what is reasonable. Kant is appealing here to the faculty of reason as a faculty which is universally shared. The employment of reason, while done on an individual basis, employs a faculty which is the same for everyone and thereby does not allow for dispute.³⁵ Although we can be seen as giving the moral law to ourselves, we do so in terms of a universally shared capacity for reason removed from any empirical differences that exist between people, so that the conception we give to ourselves is the same as that which everyone else gives to themselves.

Yet how is it that a moral law which pure practical reason gives to itself is able to direct us to act morally? If the moral law is to determine action but cannot do so by appealing to the prospect of what results from that action, what is left in the moral law to determine what actions we should take and to motivate us to take those actions? The only

³⁴ Kant writes: "Everyone must admit that a law, if it is to hold morally, i.e., as a ground of obligation, must imply absolute necessity. ...He must concede that the ground of obligation here must not be sought in the nature of man or in the circumstances in which he is placed, but sought a priori solely in the concepts of pure reason, and that every other precept which rests on principles of mere experience, even a precept which is in certain respects universal, so far as it leans in the least on empirical grounds (perhaps only in regard to the motive involved), may be called a practical rule but never a moral law" FMM, pp. 5-6; Ak. 389.

³⁵ Kant writes: "inasmuch as there is, objectively speaking, still only one human reason, there cannot be many philosophies; ...to admit that there is another (and true) philosophy ...would be admitting that there are two different philosophies concerning the same thing, and that would be self-contradictory." MEJ, P.5-6; Ak.207.

thing left in any directive, outside of the object it is directed towards, is its form. For Kant, the categorical imperative which directs us to moral action is based on the formal aspects of a law which reason could give to itself. Kant formulates the categorical imperative as the command to act so that "the maxim of your will could always hold at the same time as a principle establishing universal law."³⁶ If we are motivated solely by the idea that our action could be universalized, then we act out of duty to the moral law and thereby our action is morally commendable. Yet what is it that motivates us to act according to the categorical imperative and possibly contrary to our sensual impulses? What could possibly motivate us to act in accordance with the formal aspect of a law, even one given to us by our reason, over all other motivations to act differently? For Kant, it is the fact that the moral law is a law that we give to ourselves, and which expresses our true nature as free beings, which motivates us to act in accordance with it. Acting in accordance with a law which we give to ourselves reflects our human dignity as free rational beings. In acting morally, we recognize our shared human dignity.

Although the categorical imperative is derived from the formal aspect of a law which reason gives to itself and is derived independently of any empirical ends, Kant holds that there is an end, or object, to which the categorical imperative aims. This object is not empirical, and is not to be confused with the postulation of a particular conception of the good. The highest good (or the *summum bonum*) is an end given a priori, determined

³⁶ KPV, p. 30, Ak. 30. Kant gives a number of different formulations of the Categorical Imperative, e.g., FMM p. 44, Ak. 421; p. 54, Ak. 429; and p. 56, Ak. 431, but all are based on this idea of the formal aspects of a law which reason could give to itself.

solely by the moral law. The highest good is the end which must be aimed at as given by the categorical imperative. In fact, as Kant presents it, the highest good is an alternative formulation of the categorical imperative.³⁷ Yet what could be an a priori end, given that for Kant only good will is good without qualification? Kant holds that the only thing which can be absolutely good in itself, i.e., never be desired so as to bring about something else, is ourselves as rational being. From the perspective of the moral law, rational beings are always and only ends in themselves. Yet what does this mean in terms of directing our actions? That rational agents are ends in themselves serves only to limit moral actions. In acting morally, we can never act such that we treat people only as means to the attainment of another end. It follows from this that "every rational being must be able to regard himself as an end in himself with reference to all laws to which he may be subject, whatever they may be, and thus as giving universal laws."³⁸ In other words, a law, if it is moral, cannot treat people simply as a means, but must respect them as beings with the capacity to act in accordance with a conception of law which they give to themselves. Given the universalizing condition on the moral law, and the fact that rational beings must be treated as ends-in-themselves, we arrive at the concept of the summum bonum as aiming to bring about a realm of ends. Kant writes: "Because laws determine ends with regard to their universal validity, if we abstract from the personal difference of rational beings and thus from all content of their private ends, we can think of a whole of all ends in systematic connection, a whole of rational beings as ends in

³⁷ *FMM*, p. 52; *Ak.* 428.

³⁸ *FMM*, p. 64; *Ak.* 436.

themselves as well as of the particular ends which each set for himself.”³⁹ It is this concept of the collectivity of rational beings seen as ends-in-themselves which is the object at which the categorical imperative aims, i.e., the *summum bonum*.

Setting out the nature of Kant’s moral law does not by itself establish that morality is actual, or even possible. If reason cannot direct action by itself, without reference to anything empirical, then morality as Kant conceives it is not possible. Kant needs to establish the possibility of the pure employment of practical reason, i.e., that our faculty of reason can direct action by itself without reference to empirical ends. For morality to be possible, pure practical reason must be possible. It is here that Kant’s moral theory turns to a transcendental argument.⁴⁰ Having set out what is required in order for there to be morality, and given that for Kant we know that the constraints of moral obligation are real, Kant holds that the conditions which are required for the possibility of morality must be granted as long as they are not contradictory ideas.⁴¹ The key requirement for pure

³⁹ FMM, p. 58-9; Ak. 433.

⁴⁰ A transcendental argument rests on the idea that given that we hold certain truths, we must also grant the conditions which allow for their possibility. For example, in his speculative philosophy, Kant grants a constitutive role in empirical experience to the subject as a condition of the possibility of certain *a priori* laws which we hold, e.g., the law of causality. For Kant, “a transcendental principle is one through which we represent *a priori* the universal condition under which alone things can become Objects of our cognition generally.” *The Critique of Judgment* Trans. by James Meredith. (Oxford: Clarendon Press); p. 20, Ak. 182. Principles granted through a transcendental argument are held to hold objectively, i.e., be universal and necessary, but as *transcendentals*. In claiming the subject must play a constitutive role in empirical experience does not, for example, in any way extend the empirical science of human psychology. *The only status transcendental principles have is as principles which we must hold for experience as we conceive it to be possible.*

⁴¹ This transcendental method is found throughout Kant’s critical philosophy. In his speculative philosophy, Kant aims to establish the legitimate uses and limits of reason in our knowledge of the world. Granting Newtonian physics, with its postulation of synthetic claims which require absolute necessity, e.g., claims of causality, Kant asks how is it that such claims could be true. One of the most important

practical reason is that the subject can act free of empirical determinants. Kant here makes use of his distinction between the phenomenal and noumenal realms. The actions of objects in the phenomenal realm, even the human body, are completely determined by the causes acting on it. Within his speculative philosophy, the idea of an event not completely determined by its antecedent causes, e.g., human free will, is at best seen as being not an impossibility nor a contradictory idea. Morality requires that people do have free will. Given that the idea of free will is not contradicted within speculative philosophy and the fact that humans do live under the constraints of morality, Kant grants that people do have free will. But he does not grant free will as a concept in the phenomenal realm. To grant free will in the phenomenal realm would violate the limits on rational knowledge that Kant establishes in his Critique of Pure Reason. There is no such problem however if free will granted as an unconditioned noumenal concept.⁴² As a noumenal concept, we cannot

innovations of Kant's philosophy is his conception of the subject and the role it plays in formulating experience. Kant holds it is the constitutive role which the subject has in formulating empirical experience which allows for the possibility of certain types of a priori knowledge (e.g., see KRV, pp. 22-3; Ak. B xvii-xix). For Kant, the subject is not a passive receiver of knowledge about the world, but rather plays an active role in formulating our knowledge of the world. That the subject plays a constitutive role in forming experience requires however that a distinction be made between the object as it is in our sensory perception of it and the object as it is itself. Furthermore, on Kant's analysis of empirical experience, we cannot know the object as it is in itself. What we take as sensory data about the world is really a combination of our being affected by an external object and the effect of our own formative thought processes. What we know empirically, for Kant, is the phenomenal world. What we can never come to know, the world of objects unconditioned by our thinking processes, is the noumenal world. By limiting the applicability of a priori synthetic claims to the phenomenal realm, Kant rejects extending our knowledge of the world beyond the empirical, e.g., to existence of God or human freedom. Yet within the empirical world, because of the constitutive role of the subject, there can be certain claims which are synthetic but also a priori. Kant's analysis here is transcendental. He does not simply assert that the subject has this constitutive role; neither does he justify this constitutive role for the subject based on psychological or empirical claims. Kant claims that the constitutive role of the subject must be granted in order to allow for experience to be as it is. Kant's natural philosophy is based on the claims that the subject must be given a constitutive role for it to be possible for us to have the experiences we do.

⁴² Not only does Kant reject that empirical ends can be the basis of morality in terms of his analysis of duty, he also argues for the rejection of empirical foundations from the perspective of conditions of the moral law itself. The moral law is meant to determine the action of a being with free will. Yet freedom is a noumenal concept, independent of the empirical (or phenomenal) world. But the ends of action are

know free will nor can we show examples of free will in the empirical world.⁴³ For Kant, the existence of free will is an objective moral postulate.⁴⁴ Essentially Kant's move here is to neither assert nor deny the idea of human freedom within his speculative philosophy, but to hold that its existence must be granted due to its foundational role in morality. This seemingly problematic status given to human freedom allows Kant to maintain the possibility of morality without illegitimately extending the employment of reason in his speculative philosophy. As he writes: "For speculative reason, the concept of freedom was problematic but not impossible; that is to say, speculative reason could think of freedom without contradiction, but it could not assure any objective reality to it. ...Freedom, however, among all the ideas of speculative reason is the only one whose possibility we know a priori. We do not understand it, but we know it as a condition of the moral law which we do know."⁴⁵ By granting freedom as an objective postulate in this way, Kant ensures the possibility of moral philosophy as he conceives it.

always going to be empirical. Kant concludes: "Since the material of the practical law, i.e., an object of the maxim, cannot be given except empirically, and since a free will must be independent of all empirical conditions (i.e., those belonging to the world of sense) and yet be determinable, a free will must find its ground of determination in the law, but independently of the material of the law." KPV, pp.28-9. Ak. 29.

⁴³ FMM; p. 42; Ak. 419.

⁴⁴ Kant also holds that both God and immortality are, like freedom, objective moral postulates in terms of the conditions of possibility of the *summum bonum*. They are not however known to be such a priori, as freedom is, but rather as the conditions for the object which is determined by the moral law. Kant writes with regard to these three moral postulates that "all that is meant in attributing reality to those concepts is that an object is attributable to them either in so far as they are contained in the necessary determination of the will a priori or because they are indissolubly connected with the object of this determination;" KPV, p. 5; Ak. 5.

⁴⁵ KPV p. 3-4; AK 4.

Kant makes a key distinction within his moral philosophy between the ethical and the juridical. Kant distinguishes these two parts of his moral philosophy with regard to the type of motivation allowed within each. Both the ethical and the juridical are governed by the categorical imperative. As we have seen above, for Kant, what is moral is determined without any considerations of empirical ends. The part of moral philosophy which deals with actions which also require duty to be the sole motivation of the action is the ethical. The juridical deals with that part of moral philosophy which is not concerned with questions of motivation. The juridical is only concerned with acting in accordance with the dictates of the moral law, regardless of motive.⁴⁶ This lack of concern with motives seemingly puts the juridical at odds with the main thrust of Kant's overall moral philosophy. It is important to see how the problems with which the juridical is concerned allow for this lack of concern with motivation. Kant's moral philosophy is directed at the individual rational being with free will, setting out what is morally acceptable for that type of being. The juridical is concerned with a question having a narrower scope: what is morally acceptable for a society of such individuals? The fact that the moral law is based on the universalizability of actions does not ensure that conflicts will not occur. For Kant, it would take a society of angels - rational beings not having a sensual nature - to ensure that there were no conflicts within a society due to the perfect accordance with the moral law. Kant's juridical (or political) philosophy is directed at defining the rules governing the coexistence of free beings. *The adoption of a conception of justice for free rational beings is not based however on choice.* For Kant, the adoption of a conception of justice,

⁴⁶ Kant writes: "If legislation makes an action a duty and at the same time makes this duty the incentive, it is ethical. If it does not include the latter condition in the law and therefore admits an incentive other than the idea of duty itself, it is juridical." MEJ, p. 19; AK. 219.

i.e., the granting of primacy to justice, is something people have a moral obligation to do.

Granting primacy to justice is an absolute duty reflecting people's nature as rational beings endowed with free will.⁴⁷ Even though the juridical only requires that people act in accordance with what is morally right, or just, without regard of their motivation for their so doing, what is just is set out a priori by the moral law. While our acting in accordance with the juridical may allow for our actions to be directed by their consequences, what is just is not determined by anything empirical, rather it is determined objectively by practical reason.

The key concern of Kant's political philosophy is to establish how the interaction of more than one being endowed with free will can be arranged in order to respect the freedom of others without unduly limiting one's own freedom. Kant sets out a number of conditions on the type of concerns which are therefore addressed within political philosophy. First, justice is only concerned with the "practical relationship of one person to another in which their actions can in fact exert an influence on each other (directly or indirectly)."⁴⁸ Unlike ethical philosophy, questions of justice are concerned only with the effect of one person's actions on other. In other words, political philosophy is only concerned with actions that have materiality. This limitation to external actions also means that questions of justice do not extend to the beliefs people to hold. The second condition of justice is that justice is only concerned with the relationship of one person to

⁴⁷ KPW, p. 73.

⁴⁸ MEJ, p. 34; Ak. 230.

another. Closely related to this, the third condition which Kant sets on justice is that justice is not concerned with what object motivated each person's action, but only with the formal condition of their relationship. As derived from the moral law, what is just can only be determined by the formal character of a law. For Kant, justice is not directly concerned then with questions of need or even with questions of economic distribution per se, but only with the formal relationship between free rational beings.⁴⁹

Kant proposes the following universal principle of justice to govern the interaction of rational free beings: "Every action is just that in itself or in its maxim is such that freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law."⁵⁰ This principle of the mutual extension of freedoms as the determining ground of the proper limits of liberties is a theme found throughout much of the liberal tradition.⁵¹ Because of the formal nature of this criterion of universalization, it can only serve as a criterion for determining whether a particular action or law is just. The fact that certain actions or laws can meet this universalization criterion shows them only to be in accordance with the moral law. Showing an action or a law to be just is however quite important. This importance in part rests on the claim that a person performing an unjust act can be legitimately coerced to reserve their actions. The principle of justice authorizes the use of force against the unjust. Showing a law or an

⁴⁹ On this point, Kant stands in disagreement with liberals like T.H. Green or Ronald Dworkin who see economic egalitarianism as being a key aspect of the liberal position.

⁵⁰ MEJ, p. 35; Ak. 230.

⁵¹ Mill, Rawls and Rorty also adopt this position.

action to be unjust morally legitimizes taking actions against it. For Kant, “‘right’ [or ‘justice’] and ‘authorization to use coercion’ mean the same thing.”⁵² Kant’s argument for the use of coercive force is that if the universal principle of justice determines what is the true condition of respecting people’s freedom given the coexistence of free rational beings, any action opposed to it stands in the way of truly expressing the freedom of individuals. Therefore, actions, e.g., coercive force, which help to counteract the move away from this true situation of respect, even if these actions limit the freedom of particular individuals, do in fact best express the inherent self-worth of individuals as free rational beings.⁵³ For example, a person who lies in court acts unjustly, i.e., contrary to a maxim which could accord to the universal principle of justice. It is morally acceptable for the court to jail that person as a deterrent from acting unjustly, even though doing so limits that particular person’s free movement. Making the person act justly by an appropriate amount of force – even granting the limitation which it puts on the person’s freedom – more closely accords with what is truly just. The universal principle of justice, by showing what is compatible with the freedom for all, justifies the employment of coercive force against individuals on the basis of respecting the freedom of individuals in this more general sense.

Kant’s argument here not only sets out the grounds for the legitimate use of state coercion, it also sets out the areas in which state coercion is inappropriate. For Kant, the worth placed on the individual is above all price and admits of no equivalent. Respecting

⁵² MEJ, p. 37; Ak 232.

⁵³ MEJ, pp. 35-6; Ak. 231.

the intrinsic self-worth of the person, based on their capacity for choice, is the ultimate basis of political legitimacy. Kant's political philosophy advocates a political structure that respects and protects the free will of individuals. The main mechanism for administering coercive force within a society is its public institutions, primarily its juridical, executive and legislative branches. The state is justified in the use of coercive force against people only when their actions can in fact be shown to be at odds with the respect of the free will of individuals more generally. For example, punishing someone for perjury accords with the respect for the individual more generally due to the fact that perjury undermines the fairness of the court system, which is designed to respect the rights of all people. On the other hand, the state cannot legitimately force compatibility on issues of beliefs, e.g., torturing people who do not hold a particular religious doctrine. The state is only authorized to act to counteract actions which unjustly limit the freedom of others. This requirement greatly undercuts claims on both sides in the Reformation to use state power to enforce doctrinal positions. Kant also holds that this respect for the individual entails that there are certain rights which must be granted categorically by any legitimate government. These categorical rights include many of the key tenets of liberal politics, e.g., support for private property, freedom of conscience, and certain other protections for the individual. For Kant, these rights, due to the fact that they are ultimately derived from the objective moral law, must be granted unconditionally and are beyond debate in any society. Unlike utilitarian justifications of individual rights, Kant places these individual rights beyond all calculations of social utility.⁵⁴ Thus we find in Kant the strongest

⁵⁴ Kant rejects utilitarian arguments that political rights are guaranteed by the role they play in the continuance of a peaceful society. Of course, Mill would deny that politics and morality need to be so

possible claim for liberal principles based on the universal and objective moral law founded on our capacity for practical reason.

Before completing our overview of Kant's moral and political philosophy, we need to look at his use of the original position argument, given the importance which his type of argument has for Rawls. Although the universal principle of justice sets out what is morally right, there still may be some question as to whether a law actually accords with the principle. Kant here employs an original position argument as a test for accordance with the universal principle of justice. Rather than employing the original position in an attempt to establish the legitimacy of political institutions, e.g., as Hobbes uses his appeal to the state of nature, Kant's use of the original position argument is as a test for the justness of a law or institutional arrangement. The ultimate moral basis of a political law is that it reflects the true freedom of the collective of individuals. For Kant, the legitimacy of political laws rests on the fact that they reflect the "unity of the will of all members."⁵⁵ As such, Kant holds that legitimate laws should be able to be shown to be laws which it is at least possible that everyone one in a society could come to an agreement on. Legitimate laws must be able to be shown to be agreeable within a hypothetical fair choice situation, the original position. It is clear then that the original position is "merely an idea

removed from empirical elements or that there is any advantage of their being so removed. See Mill, "On Liberty" p. 136. Furthermore, Mill argues that Kant's lack of concern with empirical consequences is a major failing of the Kantian position, allowing for the possible universal adoption of rules which are clearly unjust; *Ibid.*, p.246. Kant would charge that empirical foundations do not secure the absolute necessity which political rights require. In fact, Kant sees empirical foundations as possibly allowing for coercive situations because an individual's rights are constantly open to questions of whether they are beneficial for all groups to maintain. Ironically, empiricists, like Rorty, see this aspect of their position as beneficial, ensuring the type of rights which Kant supports. See CIS, pp. xv – xvi.

⁵⁵ KPW, p. 77.

of reason, which nonetheless has undoubted practical reality; for it can oblige every legislator to frame his laws in such a way that they could have been produced by the united will of a whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will. This is the test of the rightfulness of every public law.”⁵⁶ If a law can meet this test of being able to be chosen within the original position then it is shown to be just and people have an absolute duty to obey it. Kant’s original position does not make justice a question of choice, nor a question of whether a law accords with people’s conceptions of the good, rather it stands as a test to the justness of a law.

Section 3: Deontological Liberalism

Rawls’ position is certainly influenced a great deal by Kant. As we will see in the next chapter, Rawls’ use of the original position to identify a conception of justice for persons considered to be free and equal closely resembles Kant’s own use of the original position argument.⁵⁷ Rawls also follows Kant in maintaining that certain individual rights are categorical within a society, and are thereby beyond all consideration of utility.⁵⁸

⁵⁶ KPW, p. 79.

⁵⁷ For the most comprehensive presentation of Rawls’ use of the original position, see TJ, pp. 118-94.

⁵⁸ Rawls writes: “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few to be outweighed by the larger sum of advantages enjoyed by the many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.” TJ, pp. 3-4.

Although there is a clear indebtedness, I argue that the extent to which Rawls adopts Kantian positions has been over-estimated. In the rest of this chapter, I show how the initial starting points of both positions are vastly different. In doing so, I also attempt to undercut Sandel's main criticism of Rawls. Sandel argues that Rawls violates the neutrality of his position by accepting many of the key aspects of Kantian liberalism. For Sandel, Rawls is a 'deontological liberal,' a position which Sandel sees as being based on the following thesis: "society, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not themselves presuppose any particular conception of the good; what justifies these regulative principles above all is not that they maximize the social welfare or otherwise promote the good, but rather that they conform to the concept of right, a moral category given prior to the good and independent of it."⁵⁹ This thesis can be divided into two parts. The first part asserts support for neutrality. The second part asserts support for a Kantian-styled justification of justice, as opposed to a utilitarian one. Sandel's criticism of Rawls is based on establishing two key claims: 1) Rawls is a deontological liberal; and 2) the deontological position is inconsistent in that the second part of its thesis violates the commitment to neutrality asserted in the first part. The way in which Sandel sees that deontological liberals violate the first part of this thesis is in terms of how they establish the priority of right in the second part. Although Sandel's definition shows the deontological position to be based on the ideas of neutrality and the independence of the right, this is not all that he takes to be entailed by it. In fact, Sandel's charge of

⁵⁹ LLJ, p. 1.

inconsistency rests primarily on what he sees as underlying deontological claims for the primacy of justice.

As we have seen, given that principles of justice are regulative with regard to people's conceptions of the good, i.e., the principles of justice are supposed to override certain demands arising from a person's conception of the good, these principles require some type of primacy. Sandel distinguishes two distinct claims for the primacy of justice. The first claims moral authority for principles of justice over conceptions of the good. For example, if a claim arising from a conception of justice, e.g., a claim for free speech, conflicts with a claim arising from someone's conception of the good, e.g., the belief that God should not be criticized, the claim arising from justice should rightfully be adopted. In other words, the demands of justice trump the demands arising from one's conception of the good. Sandel calls this claim a claim for the 'moral' priority of justice. Both deontological and utilitarian liberals claim that justice, in some sense, has moral priority. This should be clear from the role justice is supposed to play within a society. What distinguishes the two positions, for Sandel, is that deontological liberals also claim the primacy of justice in terms of "a privileged form of justification." This privileged form of justification which deontological liberals claim is one which does not depend on appeals to any conception of the good. Justice is thus developed independent of - and in this sense prior to - people's conceptions of the good. It is clear from Kant's formulation of the moral law that for him what is morally right is determined independently of conceptions of the good. Kant's position can thus be distinguished from utilitarianism, in which conceptions of the good ultimately determine what is morally right.

The claim for a privileged form of justification is all that is set out in the second part of Sandel's definition of the deontological position. He holds however that there is another key position which all deontological liberals hold based on their shared reason for insisting on a privileged form of justification. Sandel first claims that part of the reason for claiming a privileged form of justification is the fact that the principles of justice are meant to be regulative with regard to conceptions of the good. As he says, the claim for priority in this sense of the term "arises from the problem of distinguishing a standard of assessment from the thing being assessed."⁶⁰ Yet utilitarians would claim that the principle of utility is clearly distinct from the conceptions of the good which it regulates, even if the utility principle itself ultimately rests on appeals to those very same conceptions of the good. If the priority of justice in terms of privileged form of justification only requires that we can distinguish 'a standard of assessment from the thing being assessed,' it seems that the principle of utility can claim, as could presumably any other conception of justice, to be so distinguishable. Sandel holds however that deontological liberals' demands for a privileged form of justification are also based on how such a justification is supposed to be achieved. Kant holds that morality cannot be based on empirical foundations. Kant thereby bases morality on a conception of the subject in which what is essential to the subject is independent of its ends. Sandel holds that all deontological liberals adopt a Kantian-styled, or unencumbered, conception of the subject. For Sandel, on the deontological view, "certain things must be true of us. We must be creatures of a certain kind, related to human circumstance in a certain way. We must stand at a certain distance from our circumstance.... we must regard ourselves as independent: independent from the

⁶⁰ *LLJ*, p. 16.

- interests and attachments we may have at any moment, never identified by our aims but always capable of standing back to survey and assess and possibly to revise them."⁶¹
- Where above we saw how Kant's conception of morality leads him to postulate this type of subject, Sandel holds that all deontological liberals – including Rawls – base their privileged justifications on acceptance of this conception of the unencumbered self. In fact, as Sandel presents the position, getting right about the nature of the self is part of the rationale of the deontological position and lends a great deal of support for the acceptance of a deontological conception of justice.

A key question is whether deontological liberals can base their argument for the primacy of justice on the conception of the unencumbered self without violating their commitment to neutrality. Whether or not this is the case depends on the conception of neutrality one adopts. If we follow Kant and hold that neutrality only requires a justification which can be seen as equally applicable to everyone, there seems to be no threat to the neutrality of the deontological position. Given that the deontological position treats all people as unencumbered, it is equally applicable to everyone, regardless of what conception of the good people hold. Yet this limited conception of neutrality has been rejected by most contemporary liberals, including those who support the idea of liberal neutrality, on the grounds that it does not truly respect different conceptions of the good. If, on the other hand, we follow Rawls and extend neutrality to include the presuppositions used to establish a conception of justice, it is clear that the unencumbered

⁶¹ LLJ, p. 175.

self places great strains on developing a neutral deontological conception of justice. For Rawls, liberals need to maintain neutrality with regard to contentious issues within a society. On this view, maintaining the neutrality of the deontological argument would require that the unencumbered self was non-contentious. Yet even Western democracies, which do widely accept a similar conception of the self within public debate, cannot be characterized as having this conception of the self as the non-contentious basis for granting primacy to justice. By claiming the primacy of justice is dependent on the unencumbered self, deontological liberals essentially claim that the reason for granting primacy to justice is not the good of stability but rather that it reflects the true nature of the self. Yet even in Western democracies, the acceptance of the unencumbered self would be initially rejected by numerous groups. For example, all groups who hold conceptions of the good which give any end a constitutive role for the subject would initially oppose the supposition of the unencumbered self. This includes conceptions which hold the subject is essentially tied to their historical or cultural circumstance or those that see the essence of the individual tied to their place in nature or religious scheme. Furthermore, on the deontological view, groups which initially reject the supposition of the unencumbered self would have no reason to change their position due to the fact that the role of justice is to reflect a conception of the self which they do not support.⁶² In contrast, if the role of justice was to maintain stability, these groups could be enticed into

⁶² Acceptance of the unencumbered self is not just yielding on a theoretical point for those groups which oppose it. The presupposition of the unencumbered self would also have considerable effects for both politics and justice. As Sandel points out "as long as it is assumed that man is by nature a being who chooses his ends rather than a being, as the ancients conceived him, who discovers his ends, then his fundamental preference must necessarily be for conditions of choice rather than, say, for conditions of self-knowledge." LLJ, p. 22.

accepting a conception of the self which they did not initially support as a means of achieving the political stability they desire. In order to maintain the neutrality of their argument for the primacy of justice given the universality of their claims, deontological liberals would also have to maintain that the unencumbered self is non-contentious within all societies. Yet again, even for Western democracies, the claim that the primacy of justice is based on acceptance of the unencumbered self seems untenable. It seems clear that there is an inconsistency between basing the primacy of justice on acceptance of the unencumbered self and supporting neutrality.

If we grant Sandel's charge of inconsistency within the deontological position, the next question is whether Rawls is a deontological liberal? This question cuts to the heart of the relationship between Kant and Rawls. Rawls, like Kant, does claim primacy of justice in the two senses of the term which Sandel spells out.⁶³ Rawls, like Kant, also grants that people have categorical rights. For Sandel, as was the case for Kant, it is only by appealing to a particular conception of the person that liberals can adequately ground their claims to categorical rights. Furthermore, Rawls seems to openly state his support for the unencumbered self. For example, in the last section of *A Theory of Justice*, Rawls states that the design of justice as fairness rightfully conceives of the person as being prior to the ends which the person chooses for themselves and that this underlies its claim for priority of right in justification. In opposition to teleological justifications Rawls writes: "The structure of teleological doctrines is radically misconceived; from the start they relate the right and the good in the wrong way. We should not attempt to give form to our life

by first looking to the good independently defined. It is not our aims that primarily reveal our nature but rather the principles that we would acknowledge to govern the background conditions under which these aims are to be found and the manner in which they are to be pursued. For the self is prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities... We should therefore reverse the relation between the right and the good proposed by teleological doctrines and view the right as prior. The moral theory is then developed by working in the opposite direction."⁶⁴

Although Sandel seemingly makes a strong case that Rawls is indeed a deontological liberal, it is clear from our analysis of Rawls and Kant that much of Sandel's argument is based on missing many of the key differences between Rawls' and Kant's projects. For example, it is clear from our earlier analysis that there are major differences with regard to the type of conflict with which each writer sees justice to be concerned. *Kant takes justice to be concerned with any conflict regarding the relationship of two people.* For Kant, the relation of a baker to a thief is a direct concern of justice. Rawls, on the other hand, limits the type of conflict with which justice is concerned to conflicts concerning a society's basic structure. The application of justice as fairness is limited to questions concerning the basic institutional structure of a society. This difference in the type of conflict which both see as a concern for justice is reflected in what both writers take to be the source of conflict. For Kant, the need for a society to have a

⁶³ TJ, p. 3; PL, p. 3.

⁶⁴ TJ, p. 560; LLJ, p. 19.

conception of justice arises from the coexistence of rational free beings. For Rawls, conflicts which are a concern for justice, i.e., those concerning the basic structure, primarily arise from demands made on it formulated in terms of people's diverse moral, religious and philosophical doctrines. For Kant, it is our nature as free rational beings which is the ultimate starting point of a conception of justice. For Rawls, it is the fact that in some societies people do not share the same conception of the good which is the ultimate starting point. From this difference in starting points it follows that the scope of their projects are also different. For Kant, justice is regulative of people's conceptions of the good with regard to all aspects of their lives. For Rawls, on the other hand, justice as fairness is regulative only within the political realm. Thus where for Kant justice regulates all aspects of a person's conception of the good to the extent that it affects other people, Rawls limits the imposition on people's conception of the good to areas directly concerning their support for the basic structure. For Rawls, even the claims that people must adopt in order to accept a conception of justice only have application in the domain of the political. Furthermore, for Kant, justice, as set out by the moral law, claims to be applicable to all society, due to the fact that it is based on appeals to our rational nature. For Rawls, the adoption of a conception of justice is limited to individual societies. In fact, some societies, for Rawls, do not even need to develop a conception of justice, e.g., his example of a society of saints. This is important with regard to the argument for the primacy of justice. Where Rawls is able to limit the applicability of his argument for justice, Kant cannot. Where Rawls claims that at least some societies grant primacy to justice, Kant must claim that all societies should grant primacy to a particular conception

of justice based on the nature of the subject. Where Rawls bases his argument for the primacy of justice on a purported factual claim about what beliefs are widely accepted within certain societies, Kant makes an absolute moral claim about what is just within all societies. Given the universality of deontological claims, it seems that non-liberal societies cannot be just. For Rawls, this is clearly not the case.⁶⁵ If we reexamine what Sandel claims is at the core of the deontological position, we can see that there is no real place for any type of considerations regarding specific historical circumstances or particular problem of stability or for limiting the scope of justice.

The differences in the type and source of the conflict with which Kant and Rawls see justice concerned underlie the different grounds both propose for granting primacy to justice. For Kant, the adoption of a conception of justice is something people, because of their noumenal nature, have a moral obligation to adopt. Justice is an end in itself given by the moral law to govern the relationship between rational beings. Acting justly, including granting primacy to justice, is an absolute duty based on our noumenal nature.⁶⁶ Justice overrules ends arising out of people's diverse conception of the good because of the nature of the person as a being with noumenal freedom. For Rawls, the demand for primacy of justice arises from the attempt to address the problem of stability within pluralistic societies. For Rawls, justice should be given primacy over people's conceptions of the good because of its role as a dispute solution mechanism, not because of the nature of the subject. That justice can act as a dispute solution mechanism allows for the

⁶⁵ LP, p.46.

⁶⁶ KPW, p. 73.

peaceful coexistence and mutual cooperation within societies. Justice thus allows for the very possibility of society. In this way, justice is seen as the first virtue of a society. Without justice, there simply could be no viable pluralistic society. The role of justice in a society and the question why it should be given primacy over people's conceptions of the good is tied not to the nature of the self, but to the role justice plays in overcoming conflict and bringing about stability within a society. In order for a conception of justice to effectively address conflicts stemming from members' diverse points of view, it must be given primacy over the competing demands made from these diverse points of view, at least with regard to questions concerning the basic structure. Where Kant basis the primacy of justice on claims made in his wider moral philosophy, Rawls begins with the problem of stability within pluralistic societies. In taking as his starting point the problem of conflict within pluralistic societies, the initial point of departure for Rawls' project - at its most fundamental level - is in fact closer to that of Hobbes than of Kant. In other words, where Kant denies Hobbesian or utilitarian positions from the start based on his moral philosophy, at this point in the argument, Rawls' argument for the primacy of justice does not reject Hobbes nor Mill. It thus seems clear that Rawls does not base his argument for the primacy of justice on his acceptance of the unencumbered self.

Sandel considers the type of interpretation I give of Rawls, but in the end rejects it. First, Sandel objects that my interpretation of Rawls cannot guarantee that justice will in fact be given primacy.⁶⁷ Rawls, however, clearly allows for the possibility that certain

⁶⁷ Sandel says "if justice depends for its virtue on certain empirical conditions, it is unclear how its priority could unconditionally be affirmed." *LLJ*, p. 30.

societies will not give primacy to justice. He does not claim that his argument for the primacy of justice guarantees the adoption of a conception of justice. The adoption of a conception of justice is based on a choice which all groups within a society face between granting the primacy of justice or civil unrest.⁶⁸ Given, for Rawls, the empirical and contingent nature of the circumstances of justice, the primacy of justice cannot be unconditionally affirmed. The conception of justice a society is asked to adopt will also greatly affect whether people will grant primacy to it over their own conception of the good. It is the case, e.g., as currently exists in parts of the former Yugoslavia, that people will sometimes choose to pursue their different conceptions of the good over attempting to develop a stable society based on a shared conception of justice. Enough people must grant primacy to justice in order for the development of a conception of justice to be a viable project. Because, for Rawls, granting primacy to justice is based on the choice of groups within a society, he cannot, and does not claim to, guarantee that primacy will be always granted to justice.

If granting primacy to justice is based on a choice, there will need to be some appeal made to a conception of the good in order to set preferences by which such a choice is made. Rawls employs here the idea of a thin theory of the good.⁶⁹ Although in a pluralistic society people hold differing conceptions of the good, there are certain aspects of these diverse conceptions which may be common across all conceptions within a

⁶⁸ PL, p. xli.

⁶⁹ TJ, p. 396.

particular society. Rawls calls these shared aspects of the conceptions of the good a thin conception of the good. It is this thin conception of the good on which Rawls basis the choice for the primacy of justice. Sandel recognizes both that Rawls' argument for the primacy of justice does rely on choice and that choice requires appeals to at least a thin conception of the good. Yet Sandel does not see that such appeals to a thin conception of the good threaten the Kantian nature of Rawls' project. For Sandel, regardless of Rawls' appeals to a thin conception of the good, the primacy of justice remains ultimately based on the unencumbered self. Sandel says, "it is important to note that although the thin theory of the good is prior to the theory of right and the principles of justice, it is not substantial enough a theory to undermine the priority of the right over the good that gives the conception its deontological character."⁷⁰ Rawls would agree that appealing to a thin conception of the good does not threaten the primacy of justice (or right).⁷¹ Yet claiming the primacy of justice is not affected by appealing to a thin theory of the good does not require a project have a deontological character. Essentially Sandel claims that if the appeals to a conception of the good are not substantial, they do not really count as appeals to a conception of the good, so that the project can still be essentially Kantian in nature. Yet Sandel misses the key point that Kant's appeal to the noumenal unencumbered conception of the self is forced by his rejection of any appeals to empirical ends, regardless how insubstantial such appeals seem to be. Rawls maintains the primacy of the right over people simply asserting their comprehensive conceptions of the good, but he clearly does not do this in the same way or for the same reason as Kant given Rawls' acceptance of at

⁷⁰ LLJ, p. 26.

⁷¹ TJ, p. 396; PL, p. 173.

least some empirical claims. Rawls clearly breaks with Kant over the need for a strict independence from empirical elements in providing a justification of a conception of justice. For Kant, the moral law, if it is to be a moral law, must be a priori, through and through. Sandel's term of priority, instead of independence, reflects Kant's attempt to get beyond any appeals to empirical ends. Yet this is an attempt which Rawls clearly abandons. While Rawls holds that justice should be to some extent independently defined, he does not claim that justice is defined a priori nor that it must be justified in terms of an a priori conception of the self. For Rawls, the priority of justice is based and determined by the development of a fair conception of justice for a pluralistic society. Thus, where for Kant, contingent elements are contraband in determining what is just; for Rawls, only what is contentious is contraband. For Rawls, appealing to a thin theory of the good neither threatens the primacy of justice nor requires a commitment to the deontological position.

Finally, Sandel argues that if Rawls presents a conception of justice along the lines which I have said he does, we can no longer say that a just society is a moral improvement over an unjust society. Sandel writes: "One consequence of the remedial aspect of justice [i.e., the idea that justice is seen as a dispute solving mechanism] is that we cannot say in advance whether, in any particular instance, an increase in justice is associated with an overall moral improvement."⁷² In fact, Sandel goes on to say that because the circumstances of justice deny that a certain level of benevolence exists within a society, it

⁷² LLJ, p. 32.

is possible that a society which lives in accordance with a conception of justice is morally worse off than some that do not, so that *"an increase in justice can fail to be associated with an overall moral improvement."*⁷³ But this separation of morality and justice is clearly what Rawls intends. Part of the problem which a conception of justice is meant to address is that what is seen as a moral improvement within a society is in dispute. If everyone could agree on what would be a moral improvement for their society, there may be no need for a conception of justice at all, e.g., as Rawls says would be the case for a community of saints. It is the conflicting views of what is morally right which brings *about the type of conflicts which are a concern for justice*. Justice is a dispute solving mechanism which aims first and foremost at bringing about stability. Whether there is also a moral improvement of a society as a result of it adopting a conception is not its prime concern. It thus seems that the reasons which Sandel presents against my interpretation of Rawls are, in the end, to be clearly rejected by Rawls himself.

Conclusion:

In this chapter, I have presented the first part of Rawls' justification for justice as fairness: his argument for the primacy of justice. I have also tried to show that Rawls is not a deontological liberal by showing that the rationale for his project is tied to resolving the problems faced by pluralistic societies rather than being based on accepting a particular conception of the person. Finally, in this chapter, I have shown how it is the problem of

⁷³ LLJ, p. 34.

pluralism which confines liberal commitments to neutrality only to what is in conflict within a particular society. In the next chapter, I'll present the last two parts of the justification for justice as fairness and develop how Rawls is able to employ a conception of the self similar to the conception of the unencumbered self without violating the neutrality of his project.

Chapter 2:

In the previous chapter, we saw that what underlies Rawls' claim for the primacy of justice is the role which justice plays in helping to maintain stability within a pluralistic society and that (contrary to Sandel) his claim for the primacy of justice does not rely on the acceptance of the unencumbered self. Rawls does, however, employ a similar conception of the self within his wider project. We need to show then how its employment avoids violating his commitment to neutrality. Furthermore, we need to examine how Rawls' claim for categorical rights fits with the seemingly empiricist nature of his project. In this chapter, I will address both of these concerns. I will also examine two interpretations of Rawls' project. First, I will examine Jürgen Habermas' claim that Rawls remains a Kantian liberal concerned with presenting the political consequences of a Kantian conception of the subject, without Kant's metaphysics. I will then address concerns Richard Rorty has regarding the practice of liberal justification. Rorty's concerns rest both with the general practice of providing any political justification as well as specific liberal attempts to justify categorical rights. Where Kant holds that categorical rights require an ahistorical basis, Rorty denies that such an ahistorical basis is available. We thus find Rawls faced with the apparent dilemma of supporting categorical rights which seem to require an ahistorical basis, but that claiming such an ahistorical basis would likely violate the neutrality of his argument. As in the previous chapter, I address all these concerns within the context of presenting Rawls' theory in terms of three levels of justification. In this chapter, I present the last two of these levels: Rawls' argument for a conception of justice which is both liberal and normative, and his argument for justice as fairness as a specific liberal conception of justice.

Section 1: Normative Conceptions of Justice

At this point in our examination of Rawls' position, we have established four key points: 1) a conception of justice can play a role in helping to maintain stability within a pluralistic society; 2) the primacy of justice, in both the moral and justificatory senses (as defined by Sandel) is based upon the role of justice; 3) it is a decision amongst people within any particular society whether they will grant primacy to a conception of justice; and 4) the likelihood of a conception's acceptance can be increased by limiting the demands placed on its acceptance. We have also shown how this fourth point can be pursued both by developing a conception which is not dependent on any particular comprehensive doctrine and by limiting the application of the claims in terms of which it is developed to the domain of the political. At this point in our examination, we have not yet shown that justice as fairness is the most appropriate conception of justice for any society. We have so far only said that justice, in whatever formulation we give of it, must be given precedence over considerations arising from particular conceptions of the good if justice is to fulfill its role of helping to maintain stability within a pluralistic society; and that justice can only play this role if justice and stability are preferred by the vast majority of people within that society.¹

¹ One of the main reasons Sandel misinterprets Rawls' position is that he seemingly misses this key distinction between the role of a conception of justice generally and the dictates of a particular conception of justice. Sandel writes: "But what exactly is the sense in which justice, as the arbiter of values, 'must' be prior with respect to them? One sense of this priority is a moral 'must' which emerges from Rawls' critique of utilitarian ethics. From this point of view, the priority of justice is a requirement of the essential plurality of the human species and the integrity of the individuals who comprise it. To sacrifice justice for the sake of the general good is to violate the inviolable, to fail to respect the distinction between persons." (LLJ, p. 16) That some conception of justice should be given moral priority is clear from the role justice plays as a dispute solving mechanism. Yet the need for this is independent of any inviolable demand to respect the individual or to opposed utilitarianism. Rawls clearly allows for the possibility of just societies in which the conception of justice is designed to promote a particular conception of the good (LP, pp. 60-7). Rawls also allows for the possibility of just nonliberal societies, societies which do not

That justice can play a role in maintaining stability does not establish that a society should adopt justice as fairness. Stability can be achieved under a number of different institutional arrangements, many of which stand in opposition to liberal conceptions of justice, including justice as fairness. For example, Hobbes proposes the establishment of an absolute sovereign, who ultimately settles all disputes concerning the basic structure, as the best way to maintain stability within a pluralistic society. In fact, Hobbes maintains that not establishing an absolute sovereign is itself a source of instability due to the fact that if the use of absolute power is later required, its reinstatement "hath the resemblance of an unjust act; which disposeth great numbers of men (when occasion is presented) to rebell."² More recently, Michael Walzer has set out a number of historical responses to the problem of stability, again many of which are opposed to liberal conceptions of justice.³ Even Rawls himself recognizes that the granting of primacy to justice - as well as adopting the domain of the political - does not presuppose the acceptance of a liberal

extend individual rights beyond basic human rights (LP, p. 43 and pp. 68-71). If Rawls' claims regarding the role of justice were inseparable from a particular liberal or Kantian conception of justice, he could not make any allowances for nonliberal positions, which is clearly not the case.

² Thomas Hobbes, *Leviathan* (Middlesex, England: Penguin Books, 1968), p. 364. An argument could perhaps be made against Hobbes' position in terms of the maintenance of long-term stability. In recent years, states which have attempted to maintain stability primarily through the use of coercive force are less stable in the long term than societies which are tolerant of diverse opinions and attempt to base their institutions upon a consensus of diverse views. This is perhaps best seen in the relative ease with which democratic societies have in changing governments compared with the difficulty many totalitarian regimes have in changing leaders (even when there is a clear line of succession). There is also a pragmatic argument for preferring non-coercive institutions. If the same degree of stability can be maintained by both societies, the added cost of maintaining constant coercive force should lead us to prefer non-coercive institutions so that more benefits arising from our social cooperation can be enjoyed by the members of those societies.

³ Walzer points out that multinational empires, like the Roman empire, and consociational states, i.e., those which consist of different cultural groups within one country, can be stable societies without necessarily being liberal. See *On Toleration*, pp. 14-29.

conception of justice, let alone justice as fairness as a particular liberal conception.⁴ At this point, we cannot even determine whether people of a particular society will grant primacy to justice, due to the fact that the specific conception of justice a society is asked to adopt greatly influences whether or not it is adopted. How a particular conception of justice determines the basic structure, what it allows for and denies, the type of revisions it requires of people's conception of the good, all affect the likelihood of people granting it primacy. We need then to move from the general role of justice we considered in the first chapter, to consider more *specific formulations of justice*.

In evaluating particular conceptions of justice, there needs to be a criterion by which to determine the appropriateness of different candidate conceptions. The constraints placed by the role of justice, including the commitment to neutrality, remain in place, but are, by themselves, insufficient to determine the best conception of justice for a society to adopt. We need then to determine how we can base a choice amongst different conceptions of justice without violating a commitment to neutrality. Part of the problem here is that the desirability of any of the broader consequences of different conceptions of justice - to which people would point as a basis for distinguishing conceptions - is most likely determined primarily in terms of people's own particular conception of the good. That people advocate a *conception because it allows for greater economic efficiency* or is

⁴ PL., pp. 374-5: "So while political liberalism is of course liberal, some political conceptions of right and justice belonging to political philosophy in this sense may be conservative or radical; conceptions of the divine right of kings, or even dictatorship, may also belong to it.... they could have freestanding conceptions of *political right and justice*... and so fall within political philosophy. Thus, of the various freestanding political conceptions of justice within political philosophy, some are liberal and some are not."

able to ensure a greater level of equality while maintaining stability seems to lead us back into the type of disputes which a conception of justice, as a dispute solving mechanism, is supposed to avoid. At this stage in the argument, we can only assume a willingness to develop a conception of justice in order to avoid physical conflict and maintain civil stability.

Rawls here distinguishes conceptions of justice in terms of the reason people have for adopting them, between conceptions which are based on a normative consensus and those which are based on a *modus vivendi*. A *modus vivendi* can be defined as an agreement based solely on the need to establish a conception of justice. An agreement dictated to the losing side in a conflict or one reached due solely to "circumstance and exhaustion" would both be seen as *modus vivendi*.⁵ Essentially, a *modus vivendi* is an agreement in which at least one side acquiesces to the conception of justice adopted in order to achieve peace. A consensus, on the other hand, specifies that all have come to recognize, given the circumstances under which the question of justice arises, that the conception adopted is the best available conception. Given the constraints placed on the furtherance of a person's conception of good within the public realm of a pluralistic society, it is clear that the subject of a consensus will most likely not be everyone's first choice of how the basic structure should be organized. Yet given that in a pluralistic society no one's first choice is likely to be acceptable, reaching a consensus on what conception of justice to adopt is the best available option. Rather than providing the individual with reasons why they should accept a conception of justice in terms of

pragmatic considerations of current self-interest, the idea of a normative consensus bases the acceptance of a conception of justice on what people think should be the conception of justice adopted for their society given its pluralistic nature. A normative consensus is an agreement on a conception of justice which people would support given the circumstances of the society and the conceptions of the good espoused by its citizens, regardless of their particular position within the society. What is important about this distinction between a *modus vivendi* and a normative consensus is that Rawls relates it to concerns about stability. The type of reasons people have for yielding to a conception of justice in the political realm matters to the likelihood of their adherence to it. People are more likely, especially during times of turmoil, to adhere to the dictates of a conception they hold for normative reason as opposed to a conception of justice they submit to only for pragmatic ones. Rawls is not claiming that a *modus vivendi* solution to the problem of stability is not viable, but that a normative conception of justice is preferable in terms of maintaining stability. If a conception of justice which can be the subject of a normative consensus is available, it then should be adopted over solutions which are based on mere *modus vivendi*.

Granting that a conception of justice based on a normative consensus is preferable, we have still not established the preference for any particular conception of justice, nor shown how such a normative conception is possible. Given the apparent ban on claims about, for example, the nature of the subject or their moral outlook, there seems to be a real question about what could serve as the basis of a normative consensus. It is

⁵ PL, p. xli; also PL, p. 147.

important to remember here that for Rawls a commitment to neutrality only extends to *claims that are in dispute within a particular society*. This localization of the constraints of neutrality is key to how Rawls establishes the possibility of a normative consensus without violating his commitment to neutrality. Rawls basis the normativity of his conception of justice on the fact that "certain fundamental ideas [are] seen as implicit in the public political culture of a democratic society."⁶ It may be the case that given the diverse conceptions of the good found within a particular society that there is no possibility of its coming to a normative consensus on a conception of justice. Yet as we have seen, Rawls clearly sets conditions on the type of society to which his conception of justice is applicable. For example, Rawls stipulates that his conception of justice is only applicable to pluralistic societies. Another key stipulation which Rawls makes concerns ideas which are accepted (or at least not disputed in the domain of the political) by all members of a society, i.e., the ideas inherent in their public culture. While people within a pluralistic society do not share the same conception of the good, Rawls holds that within at least some societies, people hold enough common beliefs from which they can develop a normative conception of justice. Furthermore, Rawls holds that the beliefs inherent in the public culture of some societies allow for the development of a liberal conception of justice.

Rawls is quite specific in characterizing the nature of these ideas inherent in the public culture. First, he holds that these ideas include considered judgments about justice

⁶ In fact, that it is based on ideas found within the public culture is one of the defining features which Rawls attributes to a *political conception of justice*; See PL, p. 13.

occurring at all levels of generality, from wide-ranging moral principles to our judgments on individual cases. For example, we hold specific principles, e.g., we should never treat other people as means, but only as ends, and specific judgments, e.g., the child across the street should not have to go to school hungry. Secondly, these considered judgments pertain not only directly to the type of political institutions which people support, but also relate to the conditions under which the choice of a conception of justice would be recognized as fair. (As we will see below, this shared recognition of what constitutes a fair choice situation plays an important role in Rawls' argument for justice as fairness.) Thirdly, these considered judgments - even the most deeply held convictions - are open to possible revision. For example, in the United States that slavery is unjust is a considered judgment inherent in the public culture; slavery has, sadly however, not always been seen as unjust by American society. To say that beliefs inherent in the public culture are ultimately revisable is not to say anything about the moral worth of the beliefs in question nor to deny that they can be held as objective moral truths within a particular comprehensive doctrine. Finally, the public culture accepts certain ideas key to the development of a liberal conception of justice included in the "tradition of democratic thought." These ideas include: the idea of "society as a fair system of cooperation over time, from one generation to the next,"⁷ (this is opposed to seeing society either as a fixed natural order, i.e., as may have been seen in the middle ages, or an institutional hierarchy justified by religious or aristocratic values); and the idea of a 'well-ordered society' as a society effectively regulated by a political conception of justice; and the idea that citizens

⁷ PL, p. 15.

should be seen as free and equal persons. Because such ideas are inherent in the public culture, Rawls is able to move from the problem of how to establish stability within a pluralistic society to the liberal question of how it is "possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical and moral doctrines" without violating the neutrality of his justification.⁸ In other words, Rawls avoids violating his commitment to neutrality by limiting the applicability of his argument for justice as fairness to those societies in which beliefs key to the development of liberal conception of justice, e.g., respect for the individual as free and equal, are not contentious amongst the different conceptions of the good (at least within the domain of the political). Rawls essentially claims that for some societies, e.g., contemporary Western societies, there is a shallow pluralism such that comprehensive doctrines are not shared, but many important normative positions about justice are.

Rawls holds that the conception of citizens as free and equal is inherent in the public culture of some societies. We need to examine this claim in order to see exactly what Rawls is claiming and how his claim avoids basing justice as fairness on a particular conception of the person. Rawls is quite clear that this characterization is a political conception of the person, as opposed to a metaphysical one.⁹ Although it is hard to define exactly, a metaphysical conception of the self basically makes claims about the essence of the person. The Kantian subject, divided into noumenal and phenomenal realms, is an

⁸ PL, p. 4.

⁹ PL, pp. 29-35.

example of a metaphysical conception. Most importantly for Rawls, metaphysical conceptions are comprehensive. Rawls' characterization of the person, on the other hand, only makes claims regarding how people should be viewed when developing a conception of justice. This characterization of the person thus only has application within the domain of the political. For Rawls, certain aspects of the person have to be settled in order to develop a conception of justice. These aspects have to be settled from the perspective of the persons developing the conception of justice themselves. In other words, this is how the people developing a conception of justice see themselves and their fellow citizens within the domain of the political. So what does Rawls take as settled by claiming the political conception of the person is free? First of all, Rawls holds that people are free, within the political realm, to formulate and revise their own reasonable conception of the good.¹⁰ In other words, a person's standing as a citizen is not affected by revisions to their comprehensive doctrines.¹¹ Given Rawls' distinction between political and comprehensive commitments, that the political conception of the person is so conceived does not deny comprehensive doctrines which hold that there are ends which are held to be unreviseable.¹² Secondly, citizens are seen as free in that they are the "self-

¹⁰ Rawls previously held that people must be situated towards their ends and pursuits in a particular way. TJ, p. 560. Essentially, in *Political Liberalism*, Rawls maintains this claim but restricts it to the domain of the political and claims that the conception is inherent in the public culture.

¹¹ Rawls writes: "when citizens convert from one religion to another, or no longer affirm an established religious faith, they do not cease to be, for questions of political justice, the same person they were before. There is no loss of what we may call their public, or institutional, identity, or their identity as a matter of basic law." PL, p. 30.

¹² PL, p. 30.

authenticating sources of valid claims" regarding justice.¹³ It is the citizenry from which the authority of a conception of justice ultimately arises. This is an idea common to modern democracies. Thirdly, citizens are seen as free in that they are responsible for the ends they pursue and can revise these ends. This freedom is important in that it allows citizens to amend their conceptions of the good so as to accord with the dictates of a conception of justice. What is important to recognize is that all of Rawls' claims about the freedom of the political subject relate to how the subject is to be viewed when developing a conception of justice and have application only within the domain of the political.

Given all the stipulations which Rawls places on the applicability of his justification in order to ensure its neutrality, e.g., the ideas inherent in the public culture, it is clear we are dealing with a very specific type of society. In fact, Rawls' characterization of the type of society with which he is concerned is modeled quite explicitly on modern Western liberal democracies. The applicability of his theory to these actual societies will be determined by the degree to which Rawls' characterization accurately reflects these societies. The neutrality of Rawls' justification would not be maintainable for a society as divided as, for example, Germany in the 1920's in which there were strong liberal, socialist, communist and fascist political movements.¹⁴ The point is that Rawls' method

¹³ PL, p. 32.

¹⁴ David Dyzenhaus holds that the inability which Carl Schmitt sees in liberalism, i.e., that it tries to be both substantive and neutral making it unable to address deep political conflicts, can also be found in Rawls. Rawls would certainly agree that the type of neutral justification which he presents is unable to address societies in which there is no shared belief. Yet Rawls is quite mindful of this fact and so limits the application of his justifications to a fairly specific type of society. While I do not think that this inability to deal with deep political conflicts undermines Rawls' project (or affects liberalism more generally), it does point to one of the position's shortcomings, which I address in the conclusion of this paper. See Dyzenhaus' "Liberalism after the fall: Schmitt, Rawls and the problem of justification" in

of justification requires a great deal of agreement amongst the citizens of a society to which it is applicable. Rawls claims that there is this level of agreement in the societies to which he addresses his justification. It may seem however that Rawls rests too much of his argument on this stipulation. In this way, Rawls' theory may seem contrived. For example, including the idea that all conceptions of the good support the basics of liberal democratic society seems to presuppose the justification Rawls' wants from the start. The degree to which Rawls' justification is actually contrived, rather than based on a true characterization of a society, is however a key test for his justification of justice as fairness. The acceptability of his method of justification is clearly dependent on whether these conditions are true for any real society. Specifically, for Rawls, one of the key questions is whether the type of society he describes resembles contemporary Western societies enough for his justification to be viable for them. This is ultimately an evaluative judgment. But even some of Rawls' critics grant that key aspects of his characterization of society are true of the contemporary United States.¹⁵ It is important to note, however, that Rawls is not claiming that an acceptable conception of justice is simply what is inherent in the public culture of any society. Rawls is not a cultural relativist with regard to justice. What Rawls does hold is that given the type and level of shared beliefs inherent in the public culture of some societies, we can provide a neutral justification of a normative liberal conception of justice. This position does not justify the abandonment of the liberal position if key liberal beliefs are not inherent in a society's public culture. It is

Philosophy and Social Criticism (Vol 22, No. 3); pp. 9-37.

¹⁵ Sandel grants that Rawls' conception of the political subject is inherent in the public culture of contemporary American society, even though he still maintains that it is a flawed conception. See Sandel's *Democracy's Discontent* (Cambridge, Mass.: Harvard UP, 1996), p. 4.

only the neutrality of a liberal conception of justice which depends on the public culture, support for liberalism does not. In other words, if the neutrality of Rawls' argument could not be maintained, this does not require that he abandon his support for justice as fairness. The neutrality of a conception of justice is something which recommends a conception of justice for adoption by a pluralistic society. If no liberal conception of justice could be shown to be neutral, it would not necessarily refute the viability of the liberal position, even for liberals, like Rawls, who see the importance of extended justificatory neutrality. As was pointed out in the introduction, there are a number of liberal positions which are not concerned with justificatory neutrality which could be still adopted if a neutral justification of liberalism is not available. These would simply not be the preferred position for liberals like Rawls.

Section 2: The Argument for Justice as Fairness

There is a good deal of debate about the status Rawls attributes to beliefs inherent in the public culture. By basing his justification on such appeals, Rawls is often characterized as either an objectivist liberal who is mistakenly taken to be a historicist,¹⁶ or a historicist who mistakenly holds to the Enlightenment project that political institutions need justifications.¹⁷ Before examining whether either of these characterizations are true, I will first set out the third and final stage of Rawls' justification. The debate about

¹⁶ RPR, p.120. Baynes, pp. 1-3 and pp. 49-76.

¹⁷ CIS, p. 57.

Rawls' appeals to beliefs inherent in the public culture can only be truly appreciated by being first familiar with the final part of his justification.

We have seen so far how Rawls argues for the development of a conception of justice generally, and how he argues for a normative liberal conception. The third level of Rawls' justification argues for his conception of 'justice as fairness' as a specific normative liberal conception of justice. Here again Rawls faces the problem of having to determine a method of selecting a conception of justice as preferable without violating the neutrality of his justification. Even granting that the societies which Rawls addresses are liberal, we still need to determine which liberal conception of justice is the most appropriate without basing this selection on contentious assumptions. Rawls bases this selection on two criteria, both of which must be satisfied by an appropriate conception. First, Rawls employs the idea of reflective equilibrium as a means of selecting the most appropriate conception of justice. He holds that the conception of justice which best achieves reflective equilibrium within a particular society is the conception which the society should adopt. Secondly, Rawls holds that the conception must be shown to have the ability to maintain stability within the society. This involves the idea of being the subject of an overlapping consensus of reasonable comprehensive doctrines. Essentially, the conception which best achieves reflective equilibrium and is able to be the subject of an overlapping consensus is the most appropriate conception for that society.

As we have said, Rawls holds that there are certain beliefs inherent in the public culture of some societies from which we can develop a conception of justice. It is also the case that these shared beliefs occur at all levels of generality, from beliefs about specific cases to wide-ranging principles. The idea behind reflective equilibrium is that an appropriate conception of justice can be developed by organizing these shared beliefs into a coherent system.¹⁸ Although these beliefs are all shared within the public culture, they do not necessarily accord with each other. For example, a society's initial support for an unregulated free market economy may conflict with its initial feelings about how workers should be treated. The formulation of a conception of justice in terms of these beliefs may require that we revise some beliefs which were initially held.¹⁹ In doing this, beliefs at all levels of generality are treated as equal. The strength of a judgment in a particular case may require some wide-ranging principle to be revised. Support for a wide-ranging principle may require that we abandon a firmly held belief about what is just in a particular case. The process of settling on political principles requires a back and forth revising of the beliefs shared within the public culture until principles can be formulated which are consistent with the revised beliefs. For example, a society could come to the conclusion that a free market system which allows for the protection of workers rights is preferable,

¹⁸ Rawls writes: "We collect such settled convictions as the belief in religious toleration and the rejection of slavery and try to organize the basic ideas and principles implicit in these convictions into a coherent political conception of justice. These convictions are provisional fixed points that it seems any reasonable conception of must account for. We start then, by looking to the public culture itself as the shared fund of implicitly recognized basic ideas and principles. ...a political conception of justice, to be acceptable, must accord with our considered convictions, at all levels of generality, on due reflection" (TJ, p. 8).

¹⁹ The process of revision within reflective equilibrium allows Rawls' justification to avoid the charge of being too conservative. See "The Independence of Moral Theory," pp. 7-8.

revising its initial support for an unregulated free market. The principles which are finally arrived at through this process of revising beliefs are in *reflective equilibrium*.²⁰

Reflective equilibrium is, however, only an ideal towards which conceptions of justice aim. The shared number of beliefs and positions which would have to be considered to reach perfect reflective equilibrium, if perfect reflective equilibrium is even possible, would certainly place a large methodological constraint on its achievement. It is also the case that given the number of beliefs which would have to be formulated into a coherent system, it may not be apparent that principles of justice are in reflective equilibrium. Rawls therefore adopts a test for reflective equilibrium. He holds "if ever reflective equilibrium is attained, the principles of political justice may be represented as the outcome of a certain procedure of construction."²¹ The test procedure which Rawls proposes is that a conception of justice could be shown to be chosen within a modeled fair choice situation. Rawls holds it is necessary to employ a fair choice model due to the complexity involved in recognizing reflective equilibrium. In appealing to a fair choice situation, Rawls is simply adopting a method commonly employed in social theory of modeling 'a simplified situation' and then showing how rational agents would act under

²⁰ As was pointed out in the introduction, because of the wide nature of reflective equilibrium, the arguments of all three stages are open to consideration. The appeal to reflective equilibrium thus unites the three stages into one unified argument for justice as fairness, as opposed to being an argument proposed in three independent stages. I presented Rawls' argument for justice as fairness in the three stages only as a way of more clearly seeing the moves in his argument.

²¹ PL, pp., 89-90.

these limited conditions.²² The use of a fair choice model is employed simply as a means of simplification.²³

Rawls offers several characterizations of fair choice situations. His first characterization is "to let each person propose the principles upon which he wishes his complaints will be tried with the understanding that, if acknowledged, the complaints of others will be similarly tried, and that no complaints will be heard at all until everyone is roughly of one mind as to how complaints are to be judged. They each understand further that the principles proposed and acknowledged on this occasion are binding on future occasions."²⁴ The most elaborate and well-developed characterization he calls "the original position."²⁵ The original position models a fair choice situation by limiting the

²² Rawls, "Justice as Fairness," p.141.

²³ I find Rawls' use of a fair choice model as a means of identifying a conception which most closely achieves reflective equilibrium is one of the weak links in his argument. The strength of reflective equilibrium as a method of theory selection is that it opens a conception of justice up to the widest possible range of criticism. By employing a fair choice model, Rawls in effect limits the number of criticisms a conception must face to those modeled into the fair choice situation. Furthermore, the conception of justice chosen within the original position is not necessarily the conception of justice which best achieves reflective equilibrium. For example, many liberals would want a conception of justice that recognizes the justice of providing some cultural protection to groups such as North America's native populations. Admittedly, it is hard to justify these types of rights within a fair choice situation. But a conception of justice which allows for the possibility of even limited cultural rights seems to be better able to achieve reflective equilibrium in North American societies. It would thus seem that Rawls' employment of a fair choice situation does not necessarily ensure identifying the conception which most closely achieves reflective equilibrium.

²⁴ Rawls, "Justice as Fairness," p.138. Rawls also offers the characterization of a fair choice situation as one in which a member of society decides a conception of justice as "if he were designing a practice in which his enemy were to assign him his place." "Justice as Fairness," p.139.

²⁵ I am not certain whether these different characterizations are meant to entail substantive changes in what Rawls takes to be a fair choice situation or whether they are simply different ways to view the same situation. Given the lack of detail that Rawls gives some of these formulations, it seems that the latter is more plausible. They all do however share certain basic characteristics, e.g., all give a central role to the reciprocity of treatment. For the main presentation of the original position, see TJ, pp. 17-21 and 118-

knowledge representatives have about their circumstance when choosing a conception of justice, i.e., his use of "a veil of ignorance" which denies the representative knowledge of their natural talents and social standing.²⁶ These constraints are taken to be conditions widely recognized within a society to be fair constraints under which to choose a conception of justice. As said above, these ideas are found within the public culture. The original position is therefore nothing more than a device to represent what actual individuals take to be reasonable constraints to place on the choice of a conception of justice to ensure that it is fair.²⁷ Rawls' original position can thus be seen as simply a way of drawing out the implication of beliefs about a fair choice situation already widely held within society. We need to be clear that Rawls does not claim that actual individuals are somehow bound by the decision made by representatives within the original position, as if their decision established the (hypothetical) consent of actual individuals. He is not attempting to establish that we have an obligation to adopt a particular conception of justice based on the fact that we would consent to adopting this conception of justice under ideal circumstances. The decision of representatives in the original position ultimately only shows a conception to be in reflective equilibrium and it is this -and not the actual agreement of the representatives within the original position - which is the source of

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²⁶ Alternatively, Rawls says the veil of ignorance is designed so that "no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstance," that "particular inclinations and aspirations, and person's conceptions of their good do not affect the principles adopted," and that "it should be impossible to tailor principles to the circumstances of one's own case" TJ, p. 18.

²⁷ Rawls states, "[t]hese constraints express what we are prepared to regard as limits on fair terms of social cooperation. One way to look at the idea of the original position, therefore, is to see it as an expository device which sums up the meaning of these conditions and helps us to extract their consequences" TJ, p. 21.

obligation.²⁸ In using the original position, Rawls only claims "that one conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation [i.e., the original position] would choose its principles over those of the other for the role of justice."²⁹

When considering the best conception for liberal societies, Rawls essentially limits consideration to two conceptions: his conception of 'justice as fairness' (as representing the social contract tradition) and utilitarianism.³⁰ These are the two prominent conceptions found in modern liberal political theory. Rawls gives a number of characterizations of justice as fairness in terms of two principles, the most recent of which is the following:

"a. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

²⁸ This point seems to further distance Rawls' position from the social contract tradition which he claims it is a part of (TJ, p. viii). But there are grounds for suspicion that Rawls is actually presenting a social contract theory. There are good grounds for claiming, as does Sidney Alexander, that "other forms [of social choice models], such as an individual choice theory or a sympathetic observer theory can be substituted for the contract theory ...as long as the basic substantive norms are unchanged;" "Social Evaluation through Notional Choice" in *Quarterly Journal of Economics* (Vol. 88, 1974), p. 597. For another convincing argument that Rawls in fact does not present a social contract theory see Jean Hampton's . "Contracts and Choices: Does Rawls Have a Social Contract Theory?" in *The Journal of Philosophy* (Vol. 77: 1980).

²⁹ TJ, p. 17. This however is not the view of Rawls' project taken by a number of critics of Rawls, including Thomas Nagel when he contends "[t]here is then a real question whether hypothetical choice under conditions of ignorance, as a representation of consent, can by itself provide a moral justification for outcomes that could not be unanimously agreed to if they were known in advance;" "Rawls on Justice" in *Reading Rawls* Ed. Norman Daniels (Oxford: Basil Blackwell. 1975), p. 6.

³⁰ Rawls also briefly considers intuitionism but rejects it due to its inability to provide any order or priority to conflicting intuitions. See TJ, pp. 34-45.

b. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.”³¹

Rawls qualifies these two principles by claiming that the second principle is subordinate to the first. It is this categorical insurance of political rights from any consideration of wider interests or social advantage which is one of the main differences between justice as fairness and utilitarian conceptions.³² With justice as fairness, Rawls writes, “each person possess an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.”³³ Yet these features of the social contract tradition and utilitarianism have been known for a long time, without one side being able to claim victory. Why is it that Rawls holds that he finally has shown the social contract option to be preferable? First of all, as we have seen, Rawls formulates justice as fairness without much of the metaphysical support which categorical rights are often seen to require. By limiting the application of his theory, and

³¹ PL, pp. 5-6.

³² There are certainly other differences between the two conceptions. For example, they use different references for deciding on just inequalities of wealth. Mill looks at the net benefit for society as a whole; Rawls looks at the position of the least advantaged within the society.

³³ TJ, pp. 3-4.

making the claim for categorical rights only a political claim about how people should be treated, Rawls is able to avoid many of the shortcomings associated with the social contract tradition. Secondly, Rawls' use of the original position serves to show that under a *fair choice situation*, *no one would be willing to risk not having political rights*. The veil of ignorance, i.e., that one does not know one's place within the society, forces us to ensure that the worst off position has at least basic political rights. Thus support for categorical political rights is preferable for those in the original position, the most appropriate conception of justice for a liberal society ultimately rejects utilitarian contentions and supports categorical rights. Thus by supporting categorical rights, justice as fairness is better able to achieve reflective equilibrium.

The second part of Rawls' argument for justice as fairness essentially relates the selection of the specific conception of justice back to the first two stages of his justification: the problem of stability within a pluralistic society and the idea of a normative consensus. Rawls makes the concern with stability explicit by holding that the conception of justice which is chosen within a fair choice situation, i.e., the outcome of the original position, must be able to maintain political stability. Furthermore, Rawls holds that the conception must also be shown to be based upon a normative consensus, as opposed to being based on a *modus vivendi*. Rawls holds that the conception of justice which best achieves reflective equilibrium must be shown to be the possible subject of an overlapping consensus of all reasonable comprehensive doctrines within the society. Showing a conception of justice to be the subject of an overlapping consensus simply means showing that the adoption of the conception of justice in the political realm is not unacceptable to

any reasonable comprehensive doctrine. The relationship of each reasonable comprehensive doctrine to the political conception of justice will, of course, be different. For example, someone who holds a conservative Christian doctrine may have different reasons for not opposing a conception of justice than a liberal atheist. Unless an acceptable relationship can be shown between all reasonable comprehensive doctrines and the political conception of justice, i.e., unless the conception of justice can be shown to be the subject of an overlapping consensus, it is not an acceptable conception of a pluralistic society, even if it can achieve reflective equilibrium.

The reason why we must consider whether the conception arrived at in the original position is able to be the subject of a normative consensus is that the conception is chosen behind the veil of ignorance, so that the choice is made without people having knowledge of their specific comprehensive doctrines. We need to check to see if the conception chosen in the fair choice situation is able to be the subject of an overlapping consensus when people consider it in full knowledge of their comprehensive doctrines. Much of the argument for justice as fairness as being able to achieve an overlapping consensus has been laid out in the previous sections. That the beliefs from which it is constructed – e.g., the idea of the person as free and equal, the idea of society as a fair system of cooperation, the constraints on a fair choice situation – are granted by all reasonable doctrines goes a long way to establish the possibility of an overlapping consensus. That the application of the conception is limited to the domain of the political also helps ensure that it can be the subject of overlapping consensus. Rawls thus concludes that justice as fairness is able to

be the subject of an overlapping consensus; and that it is the preferable conception of *justice for the type of society he addresses*.

Section 3: Two Interpretations of Rawls

Having set out the final stage of Rawls' justification, I will now return to look at two conflicting views of what Rawls is actually doing in appealing to the beliefs inherent in the public culture. This is useful for two reasons. First, it shows the significance of *Rawls' appeal to a society's public culture*. Without seeing this appeal within the context of liberal debates, one misses the importance of Rawls' appeal to beliefs inherent in the public culture in allowing his justification to avoid becoming entangled in debates about the status of its claims. Secondly, it addresses two prominent mischaracterizations of Rawls' project: the continued claim that Rawls remains essentially a Kantian (objectivist) liberal; and the claim that Rawls is a historicist. The key point of contention between the interpretation of historicists, like Rorty, and objectivists, like Jürgen Habermas, is the *status which Rawls gives to the beliefs which he holds are inherent in the public culture*. Rorty is, however, one of the few historicists who recognizes the possibility of an historicist interpretation of Rawls. Many historicists do not appreciate that Rawls' justification is modeled on the historical circumstances of a particular community. For example, Walzer claims that "beyond the minimalist claim for the value of peace, and the rules of forbearance that it entails, ...there are no principles that govern all regimes of toleration or that require us to act in all circumstances, in all time and places, on behalf of a particular set of political or constitutional arrangements. Proceduralist arguments [i.e.,

the type of justification which Rawls presents] won't help us here precisely because they are not differentiated by time and place; they are not properly circumstantial."³⁴ As was the case with Sandel, Walzer seems to misread Rawls because of his early declarations of support for Kant and the universalist appearance of the original position argument, missing how Rawls presents a procedural conception of justice which is tied to the circumstances of particular societies.

The reason why I first presented the final stage of Rawls' justification is that Habermas' and Rorty's interpretations deny the importance of key aspects of this final stage. Rorty's interpretation of Rawls questions what is accomplished through the use of reflective equilibrium. Rorty rejects the view that liberals should be engaged in the practice of political justification which attempts to put certain political dictates beyond any debate within a society. As we will see, it is unclear whether Rorty means to also reject Rawls' use of reflective equilibrium. The reason for this uncertainty about Rorty's position is that his division between a priori justification and historicism does not allow a clear place for a historicist justification, as Rawls' use of reflective equilibrium is meant to be. Habermas' interpretation of Rawls, on the other hand, focuses too much on his use of the original position, leaving the idea of an overlapping consensus without justificatory significance. For Habermas, Rawls is trying to provide a more acceptable philosophical basis for the Kantian position. It is only by addressing both of these misinterpretations that we come to see the true nature and strength of Rawls' neutral justification of justice as fairness.

³⁴ Walzer, *On Toleration*, pp. 2-3.

Habermas:

Habermas would disagree with the seemingly historicist (or as he calls it 'contextualist') interpretation of Rawls which I have offered so far. Habermas grants certain historicist implications of Rawls' position, but he concludes that "of course, Rawls does not wish to limit himself solely to the fundamental normative convictions of a particular political culture: even the present-day Rawls, *pace* Richard Rorty, has not become a contextualist."³⁵ Habermas sees Rawls as a post-Enlightenment Kantian who is primarily concerned with presenting the political consequences of a Kantian conception of the subject, i.e., the conception of the person as free and equal, without Kant's metaphysical baggage.³⁶ For Habermas, the guiding intuition behind Rawls' project is that "the role of the categorical imperative is taken over by an intersubjectively applied procedure which is embodied in participation conditions, such as the equality of parties, and in situation features, such as the veil of ignorance."³⁷ Habermas' interpretation of Rawls gives a central place to his use and characterization of the original position as a means for determining a conception of justice for citizens characterized as free and equal, ignoring the importance of rest of his justification.

³⁵ RPR, p. 120. Habermas in fact goes further than claiming that Rawls is not a historicist, to claim that Rawls' *Political Liberalism* is primarily addressed against the contextualist position. See RPR, pp. 109-110 and *Between Facts and Norms* (Oxford, Polity Press, 1996), p. 62...

³⁶ This view of Rawls is a fairly common one and not surprisingly, since Rawls maintains there is a close connection between his and Kant's positions. As we have seen, Sandel holds a very similar position. Kenneth Baynes also, I argue, misinterprets Rawls as a Kantian when he writes: "Rawls' *A Theory of Justice* can be viewed as a sustained attempt to continue Kant's project by introducing a procedural (and detranscendentalized) interpretation of the categorical imperative and concept of autonomy and by providing a more convincing justification for them via the method of 'reflective equilibrium'" (Baynes, p. 3).

³⁷ RPR, p. 116.

Habermas recognizes a close relationship between his and Rawls' philosophical projects. Habermas also sees his position as a way of maintaining Kantian politics without the metaphysical baggage. Habermas, like Rawls, wants to establish a normative liberal conception of justice while respecting the fact of plurality within many societies. Habermas also wants a conception of justice which allows for categorical rights. The main difference, and advantage, Habermas sees his position having over Rawls is that many of the elements modeled in the original position, e.g., the conception of the person, "stands in need of a prior justification."³⁸ Habermas holds he can provide such a justification, while Rawls cannot. Rather than accepting Rawls' appeal to beliefs inherent within a public culture as a sufficient ground for a liberal conception of justice, Habermas attempts to ground some of the beliefs required for the development of a liberal conception of justice on something less culturally relative: his analysis of communicative action.³⁹

Like Kant, Habermas attempts to base ethical and political norms on a conception of reason. As we have seen, for Kant, ethical and political norms have their basis in our capacity for practical reason. For Kant, practical reason is a faculty universally shared by all rational subjects. Because what is rational is not affected by empirical influences, people thinking rationally will come to the same conclusions regardless of cultural,

³⁸ RPR, p. 119.

³⁹ Habermas presents his theory of communicative action through a series of books, spanning the last thirty years. I only overview its main points in order to contrast Habermas' position with Rawls'. For the best two overviews of his theory see, his *Moral Consciousness and Communicative Action* [Oxford: Polity Press, 1990], pp. 43-116; and PDM, pp. 294-367.

historical, gender, class, or psychological differences. While every person reasons for themselves, the fact that the same capacity for reason is universally distributed amongst all rational beings and is not affected by empirical circumstances ensures the commensurability of all rational knowledge. In other words, for Kant, all rational subjects are able to determine by themselves, i.e., monologically, what is true for all rational beings. Habermas rejects the Kantian notion of subject-centered reason. But unlike other writers who reject the idea of subject-centered reason, Habermas holds that the rejection of subject-centered reason does not deny the possibility of a rational basis for social criticism.⁴⁰ Rather Habermas develops an alternative, intersubjective conception of reason, in terms of communicative action. Communicative action is action directed towards bringing about mutual understanding. Speech acts are exemplary of such actions. Unlike Kant's conception of reason, which allows for the monological employment of reason, communicative action requires the participation of at least two persons. Communicative action requires the individual test their claims against the views

⁴⁰ Subject-centered reason has been attacked on many fronts, primarily in terms of thinking's inextricable embeddedness within cultural and linguistic traditions and its unavoidable influence by such things as power relations and productive interests. Many contemporary critics, e.g., Foucault and Derrida, have concluded that the rejection of subject-centered reason entails the abandonment of the notions of reason, truth and the possibility of a rational basis for social criticism. For example, see Alasdair MacIntyre *Whose Justice? Which Rationality?* (London: Duckworth, 1988); Jürgen Habermas *Knowledge and Human Interests* (Boston: Beacon Press, 1971); Michel Foucault *The Order of Things* (New York: Pantheon Books, 1970). For Habermas, many critics of these critics reject subject-centered reason in terms of the ideal of "...an undamaged intersubjectivity" (PDM, p. 337). For example, Habermas concludes that Foucault's theory "tries to rise above those pseudo-sciences to a more rigorous objectivity, and in doing so it gets caught all the most hopelessly in the trap of a presentist historiography, which sees itself compelled to a relativist self-denial and can give no account of the normative foundations of its: own rhetoric" (PDM, p. 294). Yet for writers like Foucault and Derrida, their positions do not allow establishing the normative basis of an undamaged intersubjectivity on which Habermas sees their positions are rooted. While Habermas agrees with the critique of Kantian reason, he sees that all critics like Foucault and Derrida end up with is critique. For Habermas, Foucault and Derrida leave no place within their positions for a grounding of the social normative position on which their positions are implicitly based.

of others. Rational knowledge is determined not, as it was for Kant, by what the individual subject contributes as a knowing subject, but by what is agreed to by a community of speakers. Where for Kant the basis of social criticism is the ideal of agreement based on our shared faculty of reason; for Habermas, the basis of social criticism is what is arrived at by real communicative action.

Habermas sees Rawls' use of the original position as an attempt to justify a conception of justice "intersubjectively."⁴¹ Habermas thus sees Rawls and himself as sharing a similar concern, i.e., to develop an intersubjective justification of Kantian politics. Yet Habermas holds that his conception of communicative action is able to give these Kantian elements a firmer foundation than Rawls' appeals to the public culture of certain societies. Key to Habermas' justification of liberalism is his claim that when engaging in communicative action there are certain normative positions which are implicitly accepted. For Habermas, "anyone acting communicatively must, in performing any speech action, raise universal validity claims and suppose that they can be vindicated."⁴² Habermas claims that when we sincerely attempt to arrive at a reasoned

⁴¹ Habermas does employ the idea of a fair choice situation. Communicative action attempts to develop a conception of justice by way of consensus. There are, however, many different ways by which a consensus can be achieved, from the use of debate to the use of torture. Under certain conditions, e.g., involving the risk of death or the wide-spread use of propaganda, only an apparent consensus could be reached on a conception of justice. Habermas proposes that we can determine whether a consensus is arrived at only through the consideration of rational arguments if it could be arrived at under ideal conditions, i.e., under conditions in which the arguments of no group are marginalized. Habermas holds that any consensus which is arrived at under these conditions should be able to meet the universalizability principle. Thus the universalizability principle is meant to stand as a test to determine whether a particular consensus could be achieved within an ideal speech situation. See his *Moral Consciousness and Communicative Action*, pp. 57-68.

⁴² Jürgen Habermas *Communication and the Evolution of Society*, trans. Thomas McCarthy (Boston: Beacon Press, 1979), p. 2.

agreement, we presuppose that we intend to present arguments under fair conditions, we allow for other participants to challenge us and our premises, raise other issues and concerns. Furthermore, sincerely engaging in communicative action also presupposes "that the participants do not reciprocally destroy one another, do not lie; in general that they recognize one another as having equal rights."⁴³ Essentially Habermas claims engaging in communicative action presupposes the acceptance of certain normative positions.⁴⁴ It is these presuppositions of communicative action which allow for a universalist justification of certain tenets of liberalism. The actual conception of justice which a society adopts will be the result of an actual consensus reached within the public debate of a particular society. Regardless of what consensus that people in a society eventually comes to, for Habermas, it must accept the norms inherent in communicative action.

Habermas and Rawls do not disagree about the norms underlying a liberal conception of justice. The norms which Habermas recognizes as inherent in the practice of communicative action are essentially the same liberal norms which Rawls recognizes as being in the inherent public culture of contemporary Western societies, e.g., equality of persons, respect for differences. There is however a difference as to the basis which both

⁴³ Habermas, *Moral Consciousness and Communicative Action*, p. 199.

⁴⁴ Habermas is not the only writer to attempt to establish a neutral conception of justice by trying to locate certain presuppositions within an almost universally shared action. Allen Gewirth adopts the same approach with regard to the purposiveness of human actions. Gewirth claims that purposiveness requires the agent to demand the right to freedom and well-being and that consistency forces the agent to advocate the extension of these rights to all other rational agents. See his *Reason and Morality* (Chicago: The University of Chicago Press, 1978).

claim support for these norms. Habermas holds that these norms are rooted in the very practice of communicative action. Rawls only claims that these norms are generally accepted within some societies. To put these two positions in contrast, imagine that the idea of persons as free, equal and autonomous beings did not find its way into our public culture. If the American and French Revolutions did not occur, if Lincoln lost in the debates to Douglas, and Luther, Locke, Rousseau, Kant and Jefferson were not born, the ideas inherent in the public culture of Western societies may have been quite different. If this was the case, it would clearly undermine the neutrality of Rawls' justification. Rawls would no longer be able to claim that the basic elements of liberalism are accepted in the public culture. Although the conception of justice developed in such a society would be substantially different, for Habermas, the basic elements of liberalism would have to be accepted when developing a conception of justice, due to the normative implications of using communicative action. In other words, the applicability of Rawls' justification is dependent on historical circumstance, while Habermas' is not.

The key question Habermas raises in evaluating Rawls' project is whether in developing a neutral conception of justice, Habermas' universalist approach is preferable to appealing to beliefs inherent in the public culture. This question itself however begins to show the divide between Rawls' and Habermas' projects. Where Habermas is concerned with the development of an alternative conception of reason, Rawls is concerned primarily with the development of a neutral conception of justice. Contrary to Habermas' contention, Rawls holds that he and Habermas have "diverse aims and

motivations.”⁴⁵ For example, Rawls is concerned with formulating and defending an actual conception of justice, where Habermas is concerned with showing the rationality of the basic elements of liberalism.⁴⁶ This difference in motivations is also shown in their different initial starting points: Rawls’ project is motivated by the problem of developing a conception of justice for a pluralistic society; Habermas is motivated by the *rejection of* subject-centered reason. That Habermas misses this key difference is clear from his *questioning the importance of the idea of an overlapping consensus* to Rawls’ justification. Habermas questions “whether [the overlapping consensus] primarily contributes to the further justification of the theory or whether it serves, in light of the prior justification of the theory, to explicate a necessary condition of social stability.”⁴⁷ He concludes that “the overlapping consensus merely expresses the functional contribution that the theory of justice can make to the peaceful institutionization of social cooperation; ...intrinsic value of a justified theory must already be presupposed.”⁴⁸ In other words, Habermas holds that the use of the overlapping consensus does not add much to the justification of a conception of justice, next to the fact that it illustrates its functionality in maintaining stability within a society. Habermas takes the idea of an overlapping consensus as “merely an index of the utility, and... [not] a confirmation of correctness of the theory.”⁴⁹ Yet we have seen that Rawls is explicitly not concerned with the “correctness” of justice as

⁴⁵ PL, p.373.

⁴⁶ PL, p. 380.

⁴⁷ RPR, p. 119.

⁴⁸ RPR, p. 121.

⁴⁹ RPR, pp. 121-2.

fairness, but with its reasonableness in addressing the problems faced by a pluralistic society, including the problem of stability. Rather than addressing the ideal question of what is the correct conception of justice, Rawls asks the question how is a stable and just pluralistic society possible. It is within the context of the problems of a pluralistic society that Rawls' project arises. For Rawls, a conception's functionality in addressing these problems, primarily the problem of stability, plays an essential role in a conception's *justification*.

Misinterpreting the nature of Rawls' project leads Habermas to miss the main advantage which Rawls' project has over his own objectivist appeals to communicative action. By appealing to the presuppositions of communicative action, Habermas presents a position which is not limited to questions concerning the basic structure, i.e., Habermas' position is comprehensive. For Rawls, while Habermas presents a fairly powerful position, it is one which ultimately violates the limitation on the domain of the political, and thereby for Rawls is not acceptable as a neutral justification of liberalism.⁵⁰ Because Habermas does not recognize the crucial importance of the problem of stability and the need to determine a conception of justice that all people within a society recognize as fair, he is not concerned with presenting a neutral justification. It is this lack of concern with justificatory neutrality which allows Habermas to claim that his project gives a more secure foundation to a liberal conception of justice. Yet the concern with justificatory neutrality is central to any understanding of Rawls' project and his appeal to beliefs inherent in the public culture.

Rorty:

Rorty's exact interpretation of Rawls is at times difficult to discern. Given that his criticism of liberal justification is not formulated with Rawls explicitly in mind, it is unclear at times whether he is also referring to Rawls' project when he rejects political justifications; or whether the dispute with Rawls is simply one of semantics, in that Rorty only means to reject objectivist justifications, and not non-objectivist justifications like that presented by Rawls. The truth seems to be somewhere in the middle, with Rorty wavering between both positions.

In *Philosophy and the Mirror of Nature*, Rorty makes a distinction between epistemology and hermeneutics. Rorty identifies epistemology with "a desire to find 'foundations' to which one might cling, frameworks beyond which one must not stray, objects which impose themselves, representations which cannot be gainsaid."⁵¹ Rorty would identify attempts to provide a priori political justifications, as Kant and Habermas attempt to do, with epistemology. A priori political justifications aim to establish the legitimacy of certain political positions objectively; to say that a legitimate political structure cannot reject or stray from certain positions. Rorty argues for the rejection of epistemology in all its forms. Although justification is often seen as being closely related to the root of the liberal position,⁵² Rorty holds the inability to provide a justification is a good thing for liberals because 1) a society not concerned with universal truth more

⁵⁰ PL, p. 373.

⁵¹ PMN, p. 315.

⁵² For example, Waldron, p. 128.

closely accords with the proper ideals of a liberal democratic society, e.g., support of toleration and acceptance of diversity; and 2) it clears the way for social criticism to employ the more effective tools of narrative and utopian politics.⁵³ Rorty supports the adoption of hermeneutics. Hermeneutics is not meant to replace epistemology, in the sense of presenting a new way of establishing or justifying political positions. Rather "hermeneutics is an expression of hope that the cultural space left by the demise of epistemology will not be filled - that our culture should become one in which the demand for constraint and confrontation is no longer felt."⁵⁴ *Hermeneutics entails constantly being open to the possibility of adopting a part of someone else's position into your own; to be willing to experiment to find better ways of doing things; to listen to other people and cultures, instead of simply claiming that this is the way things must be.*

What his support of hermeneutics means for political theory is that Rorty argues for the rejection not only of political objectivism, but also for political justifications more generally. Epistemology and justification proceed "on the assumption that all contributions to a given discourse are commensurable." Political justification assumes that common ground can be found. Furthermore, epistemology and justification assume that there are "a set of rules which will tell us how rational agreement can be reached on what would settle the issue on every point where statements seem to conflict."⁵⁵ If we take

⁵³ CIS, p. 44.

⁵⁴ PMN, p. 315.

⁵⁵ PMN, p. 316.

Habermas' position, for example, not only does it assume that agreement can be reached on certain political principles, it also rests on the belief that people with diverse political options will be able to come to agreement on these principles when they consider the nature of communicative action. As Rorty says: "To construct an epistemology is to find the maximum amount of common ground with others. The assumption that an epistemology can be constructed is the assumption that such common ground exists."⁵⁶ For Kant, this common ground exists in all being noumenal subjects. For Habermas, this common ground is in all being interlocutors. In contrast, Rorty holds that what contemporary politics needs is not further attempts to justify or establish the legitimacy of particular positions, but the opening up of a space where creative political solutions can be presented.

Rorty would agree with much of my interpretation of Rawls. He recognizes that Rawls, due to his appeals to beliefs inherent in the public culture, is not attempting the same type of epistemological project as Habermas or Kant.⁵⁷ For Rorty, Rawls agrees that we are not "able to isolate basic elements except on the basis of a prior knowledge of the whole fabric within which these elements occur."⁵⁸ By appealing solely to beliefs contingently contained within a particular public culture, Rawls rejects Kant's and Habermas' suggestions that any (regardless of how limited) justification of the basic elements of justice can be carried out independently of any knowledge of the society in

⁵⁶ PMN, p. 316.

⁵⁷ CIS, p. 57.

⁵⁸ PMN, p. 319.

question. Rawls' justification is not a priori in that it ultimately depends on appeals to beliefs inherent in the public culture. But this does not mean that Rawls holds either that justification as a whole should be rejected, or that important normative political beliefs are only those that are contingently present within a society.

It is clear that Rawls makes appeals to a society's public culture in order to ground the key elements in his neutral justification. Yet Rawls does claim that the basis for his normative position is what is contingently held by a society. The beliefs inherent in the public culture can be seen as being historicist, but they do not necessarily have to be taken that way. While Rawls disagrees with Habermas' approach as a way of developing a political conception of justice, he does not deny it on the grounds that the beliefs inherent in the public culture must be historicist. Rawls should not, and does not, make any claim regarding the actual status of the beliefs inherent in the public culture. For the project to remain within the domain of the political and minimal burdens to be placed on its acceptance, Rawls should only assert that these ideas are in the public culture, without commenting on their status nor questioning why they are held in the public culture.⁵⁹ It is by remaining mute about the status of these claims that Rawls is able avoid offending either historicist and objectivist liberals. Although both sides claim that Rawls supports

⁵⁹ In saying that Rawls should not question the beliefs inherent in the public culture, I am not denying that questioning such beliefs plays an important part in social criticism and that political progress is in many ways dependent on it. In fact, Rawls' method of reflective equilibrium to a certain extent requires us to question these beliefs. The point being made here is that Rawls should not get into the type of debates which Habermas and Rorty enter about whether these norms are merely inherent in the public culture or whether their place within the public culture is determined by other factors, e.g., the presuppositions of communicative actions.

their position, it is best for Rawls to take neither side. So it is clear that Rawls does not follow Rorty, nor explicitly reject epistemology or political justification.

Rorty's belief that Rawls is presenting an essentially a hermeneutical project is also not persuasive. Rorty assumes that if Rawls is not pursuing an epistemological project, i.e., if he is not a political objectivist, then he must be pursuing a hermeneutical one. But even granting that Rawls ultimately appeals to beliefs inherent in a society's public culture, it is clear that Rawls attempts to provide a political justification. Rawls argues that justice as fairness is the most appropriate conception of justice available for a pluralistic society. This decision is based on an explicit attempt to provide a political justification. This includes the crucial role played by the idea of reflective equilibrium as a method of theory selection. Yet Rorty seems to reject reflective equilibrium as a method of political justification. He holds that the historicist position (which he attributes to Rawls) entails that "our choice of elements [from which we develop a conception of justice] will be dictated by our understanding of the practice, rather than the practice's being 'legitimated' by a 'rational reconstruction' out of the elements."⁶⁰ While Rawls would grant the first part of Rorty's statement, i.e., that our choice of basic elements is dependent on having prior knowledge of the political culture in question, a key point of contention between Rawls and Rorty is that Rawls would deny the second part. Rawls rejects the either/or implication of Rorty's claim. For Rawls, granting that we cannot provide an a priori justification of liberalism does not preclude some type of "rational reconstruction out of

⁶⁰ PMN, p. 319.

the elements" by which we can justify a conception of justice. Rawls provides a justification for our public institutions which does not reject historicism. Rorty seems however to misunderstand the nature of Rawls' project. Rorty holds to the view that justification requires objectivity, and that historicism thus entails a rejection of justification.⁶¹ Rorty sees the practice of justification as tied to the attempt to provide objective justification; justification is thus no longer available due to the recognition of the historicism of all knowledge claims. When it is clear that Rawls agrees that appeals to objective knowledge are not required to secure our political institutions, Rorty is thus willing to grant that "reflective equilibrium is as far as political theory can go."⁶² Rorty does this, without really taking into account how far Rawls thinks this lets political theory go. Rorty misses the key point that Rawls' reflective equilibrium attempts to establish a moral conception of justice, one which privileges certain principles within the public life of our society. The type of privileging of principles which Rorty sees as contrary to the proper aim of liberal politics. For Rorty, given historicism, the only task left for the political philosopher to present is a philosophical articulation of the beliefs held within a particular society. Rorty holds that "the philosopher [e.g., Rawls] is not thereby justifying these institutions by reference to more fundamental premises, but the reverse: He or She is putting politics first and tailoring a philosophy to suit."⁶³ Rawls' argument is meant to help shape what these intuitions should be, and to give support to certain principles of justice. Justice as fairness is not meant to be simply an articulation, or a redescription, of

⁶¹ CIS, p. 57.

⁶² Richard Rorty, *Objectivity, Relativism and Truth*, (New York: Cambridge UP, 1991); p. 184.

beliefs which we happen to believe. Rather, while based solely on claims which are open to a historicist interpretation, Rawls does not give democracy priority over philosophy, in the sense which Rorty seems to leave philosophy the task of tidying up our accepted intuitions. Rawls' justification of justice as fairness ultimately derives its neutrality from the fact that it is derived solely from beliefs shared by all reasonable people within a particular society. Yet this does not make justice as fairness simply an articulation of these beliefs. The range of Rawls' wide reflective equilibrium is meant to ensure that, although objective elements cannot be used to secure a conception of justice, the firmest available basis for justifying a conception of justice is used. As Norman Daniels points out, the fairness constraints (those which formulate the original position) are different from the considered judgments used in reaching the initial reflective equilibrium. Given that this is the case, he claims that "the detour of deriving the principles from the contract [model] adds justificatory force to them [i.e. the principles of justice as fairness], justification not found simply in ...[the] matching of principles and judgements."⁶⁴

It may be suggested that Rorty's conception of articulation of the beliefs we hold could be expanded to mean exactly this, a wide reflective equilibrium. Yet it seems unlikely that this is what Rorty means by articulation, given that this would move Rorty too close to supporting a type of political justification, one which attempts to privilege particular political principles. But Rorty's rejection of political justification does not seem

⁶³ Ibid; p. 178.

⁶⁴ Norman Daniels, "Wide Reflective Equilibrium and Theory Acceptance in Ethics" in *The Journal of Philosophy* (1979), p. 261.

to be, as it is with Habermas, based on a philosophical disagreement, but rather on a disagreement of concerning how to pursue liberal politics. Part of the problem which the use of reflective equilibrium presents for Rorty is that it is not open to the type of criticism which he directs towards objectivist justifications. Nevertheless, Rorty sees liberal politics better served by the employment of techniques other than political justification, e.g., the use of narratives and utopian politics.⁶⁵ Rorty's disapproving tone towards Rawls is thus not based on a philosophical dispute, but rather is based more on a pragmatic dispute about how to best forward liberal politics.

Conclusion:

In this chapter, I have set out the last two aspects of Rawls' method of justification, his appeal to beliefs inherent in the public culture as a way of ensuring a neutral justification of a liberal conception of justice, and his use of the method of reflective equilibrium and the idea of an overlapping consensus as a way of identifying the most appropriate liberal conception of justice. I have also shown, in terms of the justification as I present it, how the interpretations given by Rorty and Habermas miss crucial aspects of Rawls' project.

⁶⁵ For example, see his "Unger, Castoriadis and the romance of a national future" in *Essays on Heidegger and Others* (New York: Cambridge UP, 1991); pp. 177-192.

Conclusion: Rawls and Political Progress

In the last two chapters, I have laid out Rawls' three-staged argument for justice as fairness. In so doing, I have shown how many of Rawls' critics have misinterpreted key aspects of his position. I have also shown how his justification can remain neutral for certain societies, while asserting a liberal conception of justice which supports categorical rights. In this concluding section, I want to examine what Rawls' project accomplishes and what it does not. I will connect these observations to the viability of the wider project of justificatory neutrality.

If we look at justice as fairness, we can see that it addresses a number of crucial political questions.¹ For example, justice as fairness answers the follow questions: What scheme of rights should a society adopt? What rights should be guaranteed fair value? On what basis are social and economic inequalities acceptable within a society? While these are very important questions which any society must answer, they do not cover all of the questions which arise within political debate of pluralistic societies. Furthermore, although his two principles of justice are very suggestive, Rawls in fact rarely commits himself to positions in a number of current political debates. For example, he does not specify whether "fair equality of opportunity" extends to support for affirmative action, or how extensive an affirmative action program should be. Given that Rawls deals with people's starting position in society, does the difference principle include support for life-long social assistance? While it is clear that justice as fairness can address a number of

¹ PL, pp. 5-6.

crucial political problems, Rawls does not show how justice as fairness can help us solve many of the questions which we Westerners face.

This lack of commitment and specificity within most contemporary political debates has much to do with his method of justification. We said at the outset that support for a substantive liberal position while maintaining support for neutrality is a tricky, if not quixotic, endeavor. As we have seen, Rawls proposes to accomplish this task by appealing to the beliefs that happen to be inherent in the public culture of some societies. Essentially, Rawls limits the application of his theory to societies in which key liberal ideals are shared by all reasonable conceptions of the good and limiting the demands of neutrality to accommodating only reasonable conceptions. In arguing for justice as fairness, Rawls does not argue for the adoption of liberalism by non-liberal societies. In fact, Rawls' justification does not even provide a defense of the liberal values from which he develops justice as fairness. For Rawls, the neutrality of his justification rests then on the fact that key liberal beliefs are simply found in the public culture of liberal societies.² What is key regarding the range of issues which justice as fairness addresses is that the plausibility of acceptance within liberal societies depends on their being universally shared within liberal societies. Given that the neutrality of Rawls' justification depends on

² There is a real concern that Rawls' strategy of justifying justice as fairness could be used to further nonliberal ends in other societies. If the reasonableness of a proposal for a conception of justice is dependent on the beliefs inherent in the public culture, it is possible for groups to employ Rawls' strategy but claim that another, nonliberal, set of beliefs exist in the political culture of their society. They could presumably then claim that proposals for a liberal conception of justice are unreasonable. Rawls is clearly not committed to supporting the reasonableness of nonliberal conceptions of justice. But the possibility for this type of misuse of his justification strategy does exist and could be used in an attempt to undermine movements for democracy in societies which do not have a clear liberal democratic culture, especially if nonliberals can point to the fact that this method of justification is proposed by one of the West's most prominent liberals.

the universal acceptance of the beliefs from which he develops his conception of justice, it is not surprising that Rawls has difficulty extending his theory of justice to areas where there is less agreement. For example, Susan Moller Okin, who is sympathetic to Rawls' project, points to the omission of questions of justice of the family within his conception of justice.³ With Rorty, one also gets the sense that his ultimate criticism of Rawls is that he is not at the vanguard of the fight to further the substantive ideals of liberalism, not attempting to think up imaginative new ways to defeat the enemy. Furthermore, Okin claims that the liberalism that she sees and supports in Rawls, one which "values the individuality that is promoted and preserved by the respect for personal preferences and for the need for privacy ...promotes the opportunity of persons to live their own lives and to seek out their own conception of the good; and is well aware of the dangers that can result from the imposition of 'community values.' [This is most likely] ... to be achieved in a society considerably more egalitarian than the oligarchical-democratic hybrid that the United States is today."⁴ While Okin sees promise in justice as fairness, she holds that Rawls needs to push the egalitarian elements of his theory further. Yet claims for a more egalitarian society or attempts to sketch out the liberal position or solutions to the problems which liberal theory is now trying to address are beyond the reach of the type of justification which Rawls presents. While both questions of justice within the family and the development of new ways of addressing old and new political problems are important, they seem to require moves beyond the scope of Rawls' neutral justification. It seems

³ Susan Moller Okin, *Justice and the Family* (New York: BasicBooks, 1989).

⁴ Susan Moller Okin, "Humanist Liberalism" in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Cambridge, Mass: Harvard UP, 1989), p. 40.

then that Rawls is forced to provide us only with a partial conception of justice, one which is unlikely to be very helpful in addressing issues which are hotly debated within a society.

Given the constraints his acceptance of neutrality places on his justification, the only way which Rawls can justify a particular political position is by claiming that contrary positions cannot be held by a reasonable conception of the good. This is the approach he takes regarding one of the few contentious issues which he says anything about: the issue of abortion. Rawls sees the issue of abortion rights as being about the *balancing* of certain political values, including the rights of women as equal citizens and respect for human life. Rawls' position is that "any reasonable balance of these values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester."⁵ Rawls supports his position on the basis that "at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force.... *any comprehensive doctrine that leads to a balance of political values excluding that duly qualified right in the first trimester is to that extent unreasonable.*"⁶ Within the context of developing a neutral conception of justice for a contemporary Western society, like the United States, claiming that claims for an absolute ban on abortion are an unreasonable position does not seem to accord with the beliefs universally held within the public culture. If the dispute over abortion rights is not of conflicting political values, but rather a conflict over the proper balance of shared values, it is quite

⁵ PL, p. 243.

⁶ PL, p. 243.

possible that even if one supports abortion rights, they may not see the contrary position as being unreasonable. By building the substantive aspects of justice as fairness from beliefs inherent in the public culture, the more substantive Rawls makes his conception, the more he extends it to address contemporary political debates, the more he has to claim these solutions are inherent in the public culture. Yet the more substantive issues opposition to which Rawls holds unreasonable, the less likely his theory will be ultimately accepted. Given that in the United States there are clearly some who oppose any type of access to abortion services, the move by Rawls to include the liberal position on abortion within justice as fairness may lessen the number who accept the characterization of public culture which he gives. Given that the beliefs inherent within the public culture are what ensures the neutrality of Rawls' position, it seems that justice as fairness steps on very thin ice when it is extended to issues for which there is not widespread agreement.

In many places, Rawls himself chafes against the constraints his commitment to neutrality places on justice as fairness. At the beginning of *Political Liberalism*, Rawls sets aside a number of questions. They include the questions of just saving between generations; the extension of justice as fairness to the issues of international law; the question of what is owed to people who, through some disability, are unable to act as normal and cooperating members of a society; and the problem of what is owed to animals and the rest of nature.⁷ Rawls also states that justice as fairness can be extended to address feminist concerns, including the question of justice in the family. Rawls does take

⁷ PL, pp. 20-1.

up one of these tasks: the extension of justice as fairness to questions of international law. In his 1993 Oxford Amnesty Lecture, "The Law of Peoples," Rawls develops a liberal conception of international justice based on the acceptance of justice as fairness. One of the reasons Rawls gives for this extension is the following: "In the absence of this extension to the law of people, a liberal conception of political justice would appear *to be historicist and to apply only to societies whose political institutions and culture are liberal*. In making the case for justice as fairness, and for similar more general liberal conceptions, *it is essential to show that this is not so.*"⁸ It may be initially unclear why Rawls, who basis his argument for justice as fairness on beliefs inherent in a public culture, would be concerned to show that liberal conceptions of justice are not so limited. It is important to remember however that it is only the neutrality of justice as fairness that is dependent upon the character of the public culture. Liberalism remains a substantive political position beyond Rawls' neutral justification of it, and support for it need not depend on the contingent beliefs within a society's public culture. In drawing out the implications of justice as fairness for a law of peoples, Rawls abandons this commitment to neutrality. Rather than asking how we can develop a neutral conception of international justice, Rawls asks "what form does toleration of nonliberal societies take in this case?"⁹ In other words, rather than asking what conception of justice all societies could agree on, Rawls asks, given that liberals do not require all societies to be liberal, what is the minimum threshold liberals should have for what they view as acceptable nonliberal societies. Rather than addressing international justice from the perspective of building a

⁸ LP, p., 44.

consensus, Rawls addresses it from the perspective of liberalism. Yet Rawls recognizes this point. He grants that a number of the questions which justice as fairness leaves outstanding will most likely require stepping outside “the scope of justice as fairness as a political conception.”¹⁰ Rawls recognizes the constraints a commitment to neutrality places on the development of a conception of justice, and that sometimes a neutral justification is not available or that one’s commitment to liberalism means they must abandon the attempt to provide such a neutral justification.

There is still the question of what benefit a neutral conception of justice, like justice as fairness, has in addressing our current political debates if it is hard pressed to say anything about what is really in dispute. Does its incompleteness result in the ultimate failure of Rawls’ attempt to provide a neutral justification of liberalism? No, its incompleteness does not undermine the worth of the entire project. It is not that certain normative ideals happen to be inherent in the public culture which leads Rawls to develop a conception of justice which is liberal. Rather, because certain normative ideals are inherent in the public culture, Rawls can give a neutral defense of a liberal conception of justice. This does not tie liberals’ hands. Rawls does not say Okin and Rorty are wrong to want to address contentious political problems, only that there is not sufficient support within the public culture to allow for a neutral justification of a conception of justice which can address these issues. It is not surprising that Rawls’ appeal to beliefs universally shared within the public culture is not going to allow justice as fairness to be at

⁹ LP, p. 42.

¹⁰ PL, p. 20.

the forefront of political change. Yet perhaps the true importance of Rawls' work is that it shows exactly where the political fight within Western societies begins, while providing both a strong defense of the gains already made by liberals within these societies and a basis from which further political agreement could be made. Instead of presenting a neutral justification of a complete conception of justice, what Rawls has shown is the limits to a neutral justification of a liberal conception of justice. Instead of abandoning the idea that liberals should attempt to provide a neutral justification of their position, Rawls shows the substantial ground that can be given a neutral justification about many political essentials for contemporary Western societies. If there is no agreement, for example, about issues surrounding justice in the family and the role of political solutions in addressing problems within family structures, Rawls is unable to provide a neutral justification of a conception of justice which extends to these areas. The resources to address these problems using only shared political values do not currently exist.¹¹ It further provides a shared background in terms of which these contentious issues can be addressed. Part of the benefit of Rawls' justification of liberalism is given by the method of reflective equilibrium. The process of give and take between our principles and moral intuitions and between these and the beliefs held by others in society allows for the possibility of a recognized common perspective. This common conception regarding areas such as how people should be treated by our shared social institutions does allow us to see

¹¹ That a neutral conception of justice does not address certain issues, e.g., issues concerning the family, may also lead some to reject Rawls' justification. The incompleteness of justice as fairness in these areas is a real concern. Thus Rawls needs to maintain a balance not only between the substantive aspects of liberalism and his commitment to neutrality but also between his commitment to neutrality and the completeness of his theory.

those opposed to us in areas, such as abortion rights, still as fellow citizens. Showing that there is agreement in other areas shows that the possibility of an agreement with them may exist. Whether the solution to these issues will ultimately require liberals simply to assert their positions based only on their support for liberalism or whether the solutions to these further issues can one day be given a neutral justification based on the beliefs inherent in the public culture of some future society is still an open question. In the end, Rawls shows both how far a commitment to neutrality can and cannot go given the current public culture of Western societies.

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